Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In the

SUPREME COURT OF THE UNITED STATES

Gilbert Tiffee, Dorothy Tiffee, et. al., on behalf of
Himself and Herself
and All Others Similarly Situated,
&

Mary A. Jasso, et. al., on behalf of Herself,
and All Others Similarly Situated,
Petitioners

v.

Citizens Telecommunications Co, et al.,
Respondents, et. al.

Petition for a Writ of Certiorari to the

United States Court of Appeals

for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Gilbert Tiffee,
Dorothy M. Tiffee,
Mary A. Jasso
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Petitioners in Pro Per

QUESTIONS PRESENTED

1. *Whether fraud and perjury of any kind submitted to federal courts to support a defendant's motion for summary judgment, is in violation of Title 18 U.S.C. §1001 and a plaintiff's Constitutional Rights.*

2. *Whether the District Court can foreclose a plaintiff from presenting further evidence of a defendant's breach of duty, on the grounds of collateral estoppel, when California case law states otherwise.*

3. *Whether Congressional Act, federal statute granting right to private action and federal question, can be preempted by the lower federal courts on the grounds of collateral estoppel for a prior state action by that concerned different defendants, state claims and was tainted by fraud an fraud on the courts.*

4. *Whether the lower federal courts were correct to dismiss plaintiffs Mary Jasso and Illa Garcia, on the grounds of collateral estoppel and privity, for a prior state action that the plaintiffs were barred by State Law from participating in.*

5. *Whether a cause of action for ultrahazardous activities can be dismissed by the lower federal courts, when the plaintiffs' injuries and the defendants' activities fall under the umbrella of strict liability for ultrahazardous liability pursuant to §460 of the Calfornia Civil Jury Instructions and past California case law.*

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1. Ninth Circuit Court of Appeals, Mandate, August 10, 2010
2. Ninth Circuit Court of Appeals, Order, August 2, 2010
3. Ninth Circuit Court of Appeals, Memorandum, June 22, 2010
4. United States District Court for the Eastern District of California, Judgment, March 31, 2010.
5. United States District Court for the Eastern District of California, Order, March 31, 2010.
6. United States District Court for the Eastern District of California, Findings and Recommendations, March 11, 2010.

JURISDICTION STATEMENT

The judgment of the Ninth Circuit Court of Appeals was entered on August 12, 2010. The Ninth Circuit denied Appellants Petition for Rehearing, August 02, 2010, This Court has jurisdiction of this matter pursuant to Title 18

§1864(e); Title 28 U.S.C. §1254(1), §1331, §1343(a) and §1357; Title 47 U.S.C. §206, §207, and §505 and Supreme Court Rule 10(a)(c) and 13(1).

STATEMENT OF THE CASE

This case is important, whereas, it brings to this August Court an opportunity to make clear to the lower federal courts that fraud and perjury of any kind submitted to the courts is not acceptable and a crime punishable by Law.

This case is important as it brings an opportunity for this Court to open the gate on toxic RF radiation injuries to humans, albeit at the source. A decision by this court to let this case go forward will insure that the health and safety of the entire Nation comes first and not second to Commerce. The American people should not have to wait three or four decades as they have with DDT, asbestos, benzene, tobacco, Agent Orange and wait until tens of millions of Americans are dead and more than a 100 million have suffered injury before such injury will be admitted by the courts. This Court may well believe, the Appellants' exaggerate the importance of their case. They do not. NASA states that *RF radiation* is *electromagnetic radiation* and the same radiation as *Gamma Rays*, only less intense. The National Library of Medicine declares *RF radiation* to be a *hazardous substance* and a *chronic poison*. John Hopkins estimates there will be 30 million *Alzheimer/dementia* victims by the year 2050, and are trying to discover why? Fifteen out of fifteen of the Likely Mountain radiation victims suffered brain cell death and brain damage. One young victims exposed INUTERO is Autistic. The Appellants in this case are dead, dying and living proof of what damage this type of radiation can do to the human body. What happened at Likely Mountain should not be allowed to be covered by fraud, immunity, preemption, impunity and/or judicial discretion.

The surviving Appellants/plaintiffs were injured on Federal Lands, by the Appellees/defendants radiation emitting devices under Federal Regulation, between the years 1992 through 2002. The Appellants filed suit against these Appellees and also filed a separate suit against State of California defendants under the California Tort Claims Act, in the year 2005, in Superior Court Lassen County, California.

Two of the plaintiffs in the suit against the State defendants, Mary Jasso and Illa Garcia, were dismissed from that suit. Both women had worked for one of the State defendants and so were estopped by State venue Law, from bringing civil suit against the State defendants.

In December 2005, the Appellees removed the Appellants from Superior Court to the District Court, on the grounds the State Court did not have jurisdiction over the federally regulated defendants.

In October 2007, the Superior Court granted the State defendants a final summary judgment order, based on testimony of defendants' employees, Richard Williams and Michael Ensminger. In November 2007, the State of California defendants released the documents they had withheld from discovery and subpoena. Those documents did show the State defendants had committed fraud and fraud on the court to escape liability.

On March 11th 2009, the District Court, despite the Appellants/plaintiffs' protests, granted these Appellees/ defendants summary judgment on the grounds of collateral estoppel [App. Vol. 1. Ex. 4-5, pgs. 4-8], using the same fraudulent documents and statements that had been used in the prior state court action and that had been submitted by the Appellees in this case to support their motion for summary judgment motion in District Court. The plaintiffs protested, but were told by the Court, the type of fraud submitted by the defendants was acceptable fraud.

Theses Appellants/plaintiffs are appealing that decision and for good cause as they feel the District Court's claiming the fraudulent documents and statements submitted to it are allowed by the Court, as it is *intrinsic fraud* and accepted practice in the Courts, is in error. [App. Vol. 1. Ex. pg. 30 ¶1]. The Appellants believe the District Court was incorrect in making such a statement and erred in granting the Appellees summary judgment on that basis. The Ninth Circuit Court of Appeals also errored in Affirming the lower Court's judgment. It is Appellants belief, that fraudulent documents and perjured statements submitted to Federal Courts by any party, are in violation of Federal Law and Constitutional rights, and such fraud, obstructs justice, due process and is a crime.

The Appellants believe it is important this High Court, address the issue of whether fraud and perjury submitted to Federal Courts, that corrupt the judicial process, interferes with due process and violates Constitutional rights of the innocent party are acceptable practice in a Federal Court of Law. (*"The alleged submissions of fraudulent documents and statements by the defendants to the District Court, falls under Title 18 U.S.C. §1001 and such acts are a federal crime. [United States v. Yermian, 468 U.S. 63 (1984)]. (See Note 6)."*

Appellants also need this High Court to address several issues that have arisen in the District Court's granting summary judgment on the ground of collateral estoppel for a prior State court action against different defendants. Those issues include Appellants Questions, two through four.

Question Two, arises from the District Court's foreclosure of any of the plaintiffs' evidence, when the State courts have ruled otherwise in cases involving collateral estoppel.

Question Three, asks this Court whether federal statute granting right to private action and federal ques-

tion, can be preempted by the lower federal courts on the grounds of collateral estoppel for a prior state action, when state and federal case law declare, otherwise.

Question Four asks this Court whether two of the plaintiffs that were barred by State venue Law, from participating in the civil action against the State defendants, can be barred from bringing civil suit in federal court against the Appellees.

Appellants Fifth question, asks this Court to settle the issue of whether the Appellants cause of action for strict liability for ultrahazardous activities can be held against the defendants, when the plaintiffs' injuries and the defendants' activities fall under the umbrella of strict liability for ultrahazardous liability pursuant to §460 of the California Civil Jury Instructions and past California case law

APPELLANT'S AND BACKGROUND and PROCEDURAL HISTORY

Appellants/plaintiffs are in Pro Per, are not attorneys and due to lack of funds they are unable to hire counsel. Appellants would hope this High Court keep that in mind and forgive the construction errors the Appellants are bound to make.

The Appellants/plaintiffs are claiming they were exposed under color of Law, to RF electro/magnetic radiation at the Appellees telecommunications' site at Likely Mountain, Modoc National Forest, California, (Federal Lands leased by the Appellees) and suffered severe bodily harm, death, disabilities and economic loss from the radiation exposure.

The Appellants/plaintiffs filed suit in Lassen County Superior Court of California, in September 2005, against these Appellees/defendants, for their injuries. The Appellees/defendants then removed the case to Federal District Court of Eastern California, December 30, 2005 (D.C.Dkt. No.1), claiming federal jurisdiction and question and

subsequently filed a motion to dismiss plaintiffs Complaint, January 9, 2006. The District Court found plaintiffs' State complaint deficient and gave them leave to amend. The plaintiffs filed their First Amended Complaint in February 2007.

Defendants then filed a motion to dismiss plaintiffs' First Amended Complaint. The District Court denied that motion, July 30, 2007.0

Defendants next filed a motion for summary judgment [D.C. Dkt No. 170]. The District Court granted that motion, March 31, 2009, on the grounds of collateral estoppel.

Appellants then filed an appeal with the Ninth Circuit Court of Appeals, April 24, 2009. The Ninth Circuit denied the Appellants' Appeal on June 22, 2010. and denied Appellants' Petition for Rehearing August 2, 2010. Thus leaving these Appellants with no other recourse, but to come before this High Court and Petition for a Writ of Certiorari.

ARGUMENT

QUESTION 1. *Whether fraud and perjury of any kind submitted to federal courts to support a defendant's motion for summary judgment, is in violation of Title 18 U.S.C. §1001 and a plaintiff's Constitutional Rights.*

District Court Statement 1

> *"[T]he alleged fraud – consisting of 'deliberate, intentional misrepresentations, untruths, half truths, and deceitfully misleading affidavits, arguments and declarations" . . . is clearly what courts have consistently characterized as intrinsic fraud, not extrinsic." Beresh v. Sovereign Life Ins. Co., 92 Cal.App.3d 547, 553 (2d Dist. 1979)."14 Relief is not available in a subsequent proceeding on the basis of intrinsic fraud. Id. "The reason of this*

rule is, that there must be an end of litigation; and when parties have once submitted a matter, or have had the opportunity of submitting it, for investigation and determination, and when they have exhausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy." Pico v. Cohn, 91 Cal. 129, 133 (1891).]" [App.Vol.1. pg.30,¶1].

"Accordingly, plaintiffs' allegations of intrinsic fraud do not undermine the substance of the state court decisions." [App.Vol.1. pg.30,¶2].

The District Court, in citing California case Law, rationalizes its use of the same alleged fraudulent statements and documents used by the Superior Court, to grant summary judgment in the prior state case, for its own use in granting the defendants in its Court, summary judgment. The Court tells the plaintiffs that *"deliberate, intentional misrepresentations, untruths, deceitfully misleading affidavits, arguments and declarations,"* are considered *"intrinsic fraud,"* and allowed in its Court Room.

The Appellants believe such judicial findings and summary judgment in favor of the Appellees are in error. For it is the Appellants' belief, false documents and declarations, of any kind, submitted to a Federal Court is outright obstruction of justice, a crime in violation of Title 18 U.S.C. §1001, and in violation of the injured party's Constitutional rights to due process and equal protection of the Laws. Pursuant to the following California case Law, the commission and submisison of fraudulent documents and statements to state and federal courts is not *intrinsic fraud*, at all, but instead, are acts of *extrinsic fraud* and *fraud on the courts*.

"As this court recently noted, "A final judgment may be set aside by a court if it has been established that extrinsic factors have prevented one party to the litigation from presenting his or her case. [Citation.] The grounds for such equitable relief are commonly stated as being extrinsic fraud or mistake. However, those terms are given a broad meaning and tend to encompass almost any set of extrinsic circumstances which deprive a party of a fair adversary hearing. It does not seem to matter if the particular circumstances qualify as fraudulent or mistaken in the strict sense. [Citations.]" In re Marriage of Park (1980) 27 Cal.3d 337, 342 [165 Cal.Rptr. 792, 612 P.2d 882], italics added; In re Marriage of Coffin (1976) 63 Cal.App.3d 139, 149 [133 Cal.Rptr. 583]; Munoz v. Lopez (1969) 275 Cal.App.2d 178, 181 [79 Cal.Rptr. 563].)

Thus, apart from its discretion under section 473, a court has considerable and broad discretion in equity to grant relief from a judgment on a showing of extrinsic fraud or mistake. Under its equitable jurisdiction, then, a court may provide relief in many situations other than those set forth in the statute. fn. 2 For [32 Cal.3d 903] example, courts have long interpreted a party's reliance on a negligent attorney as one kind of "extrinsic mistake" which warrants relief. fn. 3 Hallett v. Slaughter (1943) 22 Cal.2d 552, 556-557 [140 P.2d 3]; Higley v. Bank of Downey (1968) 260 Cal.App.2d 640, 644 [67 Cal.Rptr. 365]; Orange Empire Nat. Bank v. Kirk, supra, 259 Cal. App.2d at pp. 352-354.) Against this back-ground, the trial court's authority to grant equitable relief on the basis of "extrinsic mistake" in this case is clear. ***Carroll v. Abbott Laboratories, Inc., 32 Cal.3d 892. (1982).***

District Court Statement 2

> *"Plaintiffs contend that "about the first week of November 2007," (prior to the November 13 and November 20, 2007 entries of final judgments in the state cases, see Defendants' Exh. G, at Nos. 149, 159), plaintiffs obtained new information demonstrating that the state test results failed to note all frequencies and magnitude of frequencies under the state's control, "including 9 microwave frequencies that were operated during the years 1992-2002." See Opposition, at ¶ 47-52. Plaintiffs reference the handwritten field notes of State Engineer Michael Esminger (Plaintiffs' Exh. 1), the deposition of State Engineer Richard Williams, and hundreds of pages reflecting FCC licenses for Likely Mountain, with extensive technical specifications (Plaintiffs' Exh. 32).*
>
> *As defendants point out, plaintiffs, who were previously represented by counsel, failed timely to raise these matters, assuming their relevance, to the state court. As countered by defendants, "it was not until plaintiffs' counsel withdrew and the State of California defendants moved the state court to assess the costs of the litigation against the Plaintiffs that the Plaintiffs first raised the issue of supposed fraud and perjury in court. [Defendants'] Ex. G (entries 150-164)."*

With all due respect, the District Court has misconstrued the facts as given to it by the defendants. To begin with the State plaintiffs had no knowledge that documents had been withheld by the State defendants or that they had brought false documents and perjured statements into the Superior court. It was only after the State defendants won summary judgment, did they release the *Original Field Notes,* for the radiation level tests conducted by State employees Richard Williams and Michael Ensminger, at Likely Mountain, did the plaintiffs discover fraud had been committed by the state defendants. The plaintiffs then

appealed to the California Third Appellate Court, but due to their lack of funds to hire an attorney[1] and their ignorance of the Law, they filed their Appeal with the title of Writ instead of titling it Appeal. The California Third Appellate and Supreme Court denied review on that basis. The State plaintiffs next filed with the Superior Court, a motion to vacate the judgment pursuant to C.P.C. §473, the only means they could find left to them, at the time, on the grounds the defendants had committed fraud, but the Superior Court, February 19. 2008, stated they were time barred and could not make any more appeals.

---

[1] The State plaintiffs once discovering the fraud committed by the State defendants, did file a motion to vacate the Costs. It should be noted the State defendants did offer to drop the $72.000 in Costs, if the plaintiffs would drop all appeals. The plaintiffs refused. (The State plaintiffs did not learn until recently that they had made a mistake in the title of their Appeal).

> *"Apart from any statutory authority, a court has inherent, equitable power to set aside a judgment on the ground of 'extrinsic fraud or mistake.'" (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 1997) § 5:435.) The term "extrinsic fraud or mistake" is given a broad interpretation and covers almost any circumstance by which a party is deprived of a fair hearing. (Id. at § 5:438.) There need not be "fraud" in the tort sense of fraud. (Ibid.) "Extrinsic mistake" refers generally to circumstances extrinsic to the litigation that have cost a party a hearing on the merits. (Id. at § 5:449.)"* **No. B114249. – County of Los Angeles v. Warmouth (1998).**
>
> ***"C.P.C. §1916.*** *Any judicial record may be impeached by evidence of a want of jurisdiction in the Court or judicial officer, of collusion between the parties, or of fraud in the party offering the record, in respect to the proceedings."*

A 'fraud on the court" occurs where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense. See, e.g., Alexander v. Robertson, 882 F.2d 421, 424 (9th Cir.1989); Pfizer, Inc. v. International Rectifier Corp., 538 F.2d 180, 195 (8th Cir.1976); England v. Doyle, 281 F.2d 304, 309 (9th Cir.1960); United Business Communications, Inc. v. Racal-Milgo, Inc., 591 F.Supp. 1172, 1186-87 (D.Kan.1984); United States v. ITT Corp., 349 F.Supp. 22, 29 (D.Conn.1972), aff'd mem., 410 U.S. 919, 93 S.Ct. 1363, 35 L.Ed.2d 582 (1973)." **892 F. 2d 1115 - Aoude v. Mobil Oil Corporation. (1989).**

In the United States, only this High Court, has the authority to step in and remind all the courts and all the parties, that fraud of any kind submitted and/or practiced upon a Federal Court of Law, is unacceptable and a crime.

QUESTION 2. *Whether the District Court can foreclose a plaintiff from presenting further evidence of a defendant's breach of duty, on the grounds of collateral estoppel, when California case law states otherwise.*

District Court Statement 3

" 2. Identity of Claims

The controlling issue decided by the Lassen County Superior Court is identical to the central issue in this case, specifically, whether radiofrequency radiation levels on Likely Mountain exceeded federal

maximum permissible exposure ("MPE") standards. Absent some evidence that the duty of care established by the federal MPE standards was breached, plaintiffs are precluded from recovery under 47 U.S.C. § 206, and foreclosed from presenting further evidence in support of their negligence per se claim, viz., causation."

In the above statement, the District Court demands the plaintiffs must show breach of duty and causation, but then declares the plaintiffs are foreclosed from presenting further evidence than what they submitted to the Superior Court, two years earlier for a different group of defendants. By foreclosing the plaintiffs' evidence, any new evidence showing the fraud and fraud on the courts was barred by the District Court. The Court gave Plaintiffs no opportunity or ability, to show the federal defendants breached their duty of care and did so under color of Law.

District Court Statement 4

For the reasons set forth below, this court finds that plaintiffs' claims are barred by collateral estoppel. Since the court does not weigh, de novo, the evidence before it, it need not separately analyze plaintiffs' objections to more than one hundred of defendants' proffered undisputed facts.

*"**No. 59.** At the time of the February 2, 2005 testing, all State radio transmitter equipment (except three microwave transmitters) was turned off and measurements for ambient RF levels were taken."*[App.Vol.1. Ex.6. pg.20].

The District Court when addressing Defendants' *Undisputed Fact No. 59,* to support its contention that the plaintiffs do not have a case, unwittingly, quotes a direct lie given to him by the defendants and their expert witnesses, Richard Williams and Michael Ensminger. The

original field notes or test report for February 2, 2005, the sentence or phrase *"all State radio transmitter equipment (except three microwave transmitters) was turned off),* cannot be found in the original field notes or the test report for February 2, 2005. The original report shows that State engineers, did not take any testing equipment with them to measure any frequency higher than 1.5 Gigahertz which is equal to 1500 Megahertz. [D.C.Dkt.190. Ex.2 pg.9,¶4]. The microwave frequencies at Likely Mountain, are all higher than 1500 Megahertz, running from 1855 Mhz. through 18895 Mhz. [see pages 14-15 this document].

What can be found within the original February 2005, documents authored by Richard Williams, the Appellees/defendants' expert witness, is the following statement;

> *"Personal monitors should also probably be worn by anyone climbing towers or working above ground levels, where they would be placed in the transmission beams with the obvious possibility of exposure to higher RF energy levels."* [D.C.Dkt.No. 190. sec 2. pg.10.¶3].

The above statement made by Mr. Williams to his employer the State of California Department of General Services, [D.C.Dkt.190. Vol.1. sec.2. pgs.8-11], should have been evidence enough for the District Court to take note that the plaintiffs were exposed to higher RF energy levels, i.e., electromagnetic radiation, than Richard Williams and Michael Ensminger claimed. The Court was told that plaintiffs climbed the tower and were at above ground levels for up to 10 or more hours per day.

Plaintiffs do not understand how the lower courts can accept statements made by Mr. Williams and Mr. Ensminger, as evidentiary proof there was no radiation levels that were harmful to plaintiffs at Likely Mountain, while at the same time foreclosing the plaintiffs' right to

use that same evidence to show the fraud and perjury contained within those documents.

District Court Statement 5

"No. 92. State frequencies that were activated for the purpose of making MPE measurements were: 42.08, 42.34, 47.10, 151.415, 153.755, and 858.9875 MHZ."

Plaintiffs submitted to the District Court, federal and state records for active antennae at Likely Mountain, in their Appendix of Exhibits, Section 32, in the same format as the defendants presented their evidence, that show the following frequencies' are in operation at the Mountain and were omitted from the tests conducted by the State engineers.

	Exhibit No.	
1.	Ex. 31-A:	152.750Mhz. (pgs.411-4140).
2.	Ex. 31-A:	153.440Mhz. (pgs.415-421).
3-10	Ex. 31-C:	454.075Mhz.; 454.275 Mhz.; 454,150Mhz.; 454.225Mhz.; 454,457Mhz.; 454,550Mhz.; 454.575Mhz. (pgs.422-428).
11.	Ex. 31-D:	48.020Mhz. (pgs.429-440).
12.	Ex. 31-E:	463.900 Mhz. (pgs.441-450).
13.	Ex. 31-F:	452.175 Mhz. (pgs.451-459).
14.	Ex. 31-G:	6152.800Mhz. MICROWAVE (pgs.460-470).
15.	Ex. 31-H:	6404.000Mhz. MICROWAVE (pgs.471-477).
16.	Ex. 31-I:	6286.190Mhz. MICRWAVE (pgs.478-490).
17.	Ex. 31-J:	18935.000Mhz. MICROWAVE (pgs.491-501).
18.	Ex. 31-K:	955.800 Mhz. (pgs.502-511).
19.	Ex. 31-M:	6345.900 Mhz. MICROWAVE (pgs.512-521)

20.	Ex. 31-N:	6093.450Mhz. MICROWAVE (pgs.522-531).
21-23.	Ex. 31-O:	5945.200Mhz. MICROWAVE 6093.450Mhz. MICROWAVE 6680.625Mhz. MICROWAVE (pgs.532-543).
24.	Ex. 31-R.	468.900Mhz. (pgs.564-569).
25-26.	Ex. 32(A)	151.355Mhz. Fixed Base; 151.355Mhz. Mobile Relay. (pgs.579-582).
27-28.	Ex. 32(C)	75.500Mhz.; 42.920 Mhz. (pgs.589-597).
29-30.	Ex. 32(H)	154.22Mhz. Base; 154.22Mhz. Mobile Relay. (pgs.628-636).
31-32.	Ex. 32(I)	155.700Mhz. Base; 155.700Mhz. Mobile Relay. (pgs.637-645).
33.	Ex. 32(J)	75.100Mhz. (pgs.653-654)
34.	Ex. 32(L)	6765.000Mhz. MICROWAVE. (pgs.664-671).
35.	Ex. 32(M)	6825.000Mhz. MICROWAVE. (pgs.672-678).
36.	Ex. 32(N)	1895.000Mhz. MICROWAVE. (pgs.679-687).
37-44.	Ex. 32(O)	463.000Mhz.; 463.025Mhz.; 463.050Mhz.; 463.750Mhx; 463.100Mhz.; 463.125Mhz.; 463.150Mhz. 463.175Mhz. (pgs.688-712).
45.	Ex. 32(P)	156.165Mhz. (pgs.713-721).
46-47	Ex. 32(Q)	154.875Mhz. Base; 154.875Mhz. Mobile Relay. (pgs.722-731).
48.	Ex. 32(R)	2181.600Mhz. MICROWAVE. (pgs.(738-742).

49.	Ex. 32(S)	6645.000Mhz. MICROWAVE. (pgs.732-737).
50-51.	Ex. 32	160.950Mhz. 160.320 Mhz. (pg.767).
52-53.	Ex 32	1855.000Mhz. MICROWAVE 1875.000Mhz MICROWAVE (pg.767).

[D.C.Dkt.No. 190. Vol.2. sec.31-32. pgs.410-767 and Vol 2. sec. 37. pgs.766-767].

The above information was gathered from copies of Federal licenses and State records that are just some of the frequencies in operation at Likely Mountain.

District Court Statement 6.

"It appears that the controlling issue revolves around and is determined by the fact of whether Radio Frequency Radiation was at a level that could cause plaintiffs' damages. The determination is one of scientific evidence. The scientific and objective tests that have been performed, after the fact, show that the RFR levels were lower than maximum permissible exposure, except for one area by the handrail of the tower, which was at 100% of the maximum permissible exposure, but did not exceed it. As noted by plaintiffs, none of the tests were done at or near the times plaintiffs were present." [App.Vol.1. Ex.6. pg.23].

District Court Statement 7.

"No. 133. When performing direct measurement in order to determine compliance with FCC's RF guidelines, all significant contributors to the ambient RF environment should be considered, including those otherwise excluded from performing routine RF evaluations." [App. Vol. 1. Ex. 6. pg. 20].

By the above statement it is clear the District Court, understands that all the antenna frequency radiation emissions are to be included in the testing process. It is

also clear the Court understands that 100% of MPE radiation level was found at the handrail with one antenna keyed on. What the Court appears not to understand is that the Richard Williams and Michael Ensminger, did not add any other contributing antenna emissions to that 100% radiation level they found at the handrail. The Court also did not consider the two men stated they turned off all the antennas before they climbed the tower. Additionally, the Court also appears not to understand that turning on one antenna at a time and recording its output, is not anywhere near the same level of radiation exposure the plaintiffs were subject to at the Mountain. No one turned off any of the approximately 100 frequencies in use at Likely Mountain, when the Appellants were at the site.

There are material issues of fact that a jury needs to decide after they hear testimony by RF radiation experts on the actual radiation being emitted by all antennas.

There has never been any litigation on the sum of the radiation emissions from the defendants antennae at Likely Mountain. The evidence the District Court is using to dismiss the plaintiffs is based on the emissions of seven frequencies, that do not belong to the defendants and does not include any of the microwave or cellular frequency emissions to be found at the Mountain.

Plaintiffs have stated to the lower federal courts, that RF radiation experts can at trial take the stand and testify as to what actual radiation emissions are being generated at the defendants' antennae. Tests are not needed. The issues are based in science and math and the radiation emissions generated by a frequency is the same from day it becomes active to the day it is deactivated. Such testimony would also show State employees Richard Williams and Michael Ensminger made fraudulent statements and documents for submission to the courts and in doing so committed fraud on the courts.

The use of fraudulent documents and declarations to influence a court's decision, is in violation of the plaintiffs rights to due process and fair litigation and equal protection of the Laws. Therefore collateral estoppel, res judicata and/or Rooker-Feldman defenses are not applicable in this case, or available as a defense for the federal defendants, who came to court with unclean hands and now have used fraudulent declarations, to win summary judgment.

District Court Statement 8.

> *"2 The subsequent evidence relied upon by the state court – particularly as set forth in the declarations of state engineers Richard Williams and Michael Ensminger – was based upon ambient radio-frequency measurements taken in 2005 and 2006, "everywhere a lookout employee might be considered to have normal access," and necessarily included "co-existing, non-State transmitters at each site," Ensminger Decl. at pp. 5-6 (Dckt. No. 170-5, at ¶¶ 20, 21), that is, "RF energy from sources other than State agencies at or around Likely Mountain," Williams Decl. at p. 6 (Dckt. No. 170-6, at ¶¶ 26, 30). The state court also considered the letter written to plaintiffs by FCC District Director Thomas Van-Stavern, which set forth the negative results of FCC testing in 2005, of the areas in which plaintiffs had worked and lived, and involving all com-VanStavern, the tests measured "no RFR levels at the area surveyed exceeding the Commission's MPE limits for public or occupational use." Van Stavern Letter (Dckt. No. 171-2)."* [App.Vol.1. Ex.5. footnote 1, pgs.7-8]. [2]

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[2] It should also be noted that the testing FCC employee Thomas Van Stavern claims the FCC made at Likely Mountain, was 3 and 4 years after the fact and after the State facility had been brought into compliance and fenced off from Public access.

It is the Appellants belief, that in any other Court of Law, in a trial for judgment, where the party was not in pro se, an opposing attorney would be able to object to the introduction of tests conducted three and four years after the fact and the Court would more probable than not grant that objection. It is also the Appellants' belief, that for employees of a defendant, to go three and four years after a crime was committed to the scene of that crime, which had long been cleaned up, — or as in this instance powered down, fenced and warning signs posted — and then come and tell the Court that he found no evidence of the crime, is not evidence, but conjecture and/or cover-up, and has no real basis in fact.

It does not take a legal expert to take a look at what the courts had to say before the commission of the alleged fraud by the State defendants, Mr. Williams and Mr. Ensminger, to see that the fraud obstructed justice and due process. The Superior Court declared before the alleged fraudulent documents and declarations were submitted to it, the following;

> *"3. The demurrer of defendants Department of Forestry and Fire Protection, California Highway Patrol, Department of Fish & Game, and Department of General Services to plaintiff Higinio Jasso's second amended complaint is overruled insofar as the court finds the second amended complaint states facts sufficient to overcome demurrer as to claims premised on Government Code §815.6 and Government Code §835.* **[3]** *The court finds the second amended complaint states facts sufficient to overcome demurrer as to mandatory duty under 8 C.C.R., §8618 and 47 C.F.R., §1.1307(b).*
> *Dated: Aug 24 2006.*
> *s/ Stephen D. Bradbury*

Judge of the Superior Court" [App.Vol.1. Ex.7. pgs. 37-39].

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[3] ***"C.G.C. §815.6.*** *Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty un-less the public entity establishes that it exercised reasonable diligence to discharge the duty.*

*"**C.G.C. §835**. Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably forseeable risk of the kind of injury which was incurred, and that either: (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or (b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition."*

The Federal District Court, declared before the alleged fraudulent documents and declarations made by Richard Williams and Michael Ensminger, were submitted to it.

> *" 2. Defendants' motion to dismiss under the primary jurisdiction doctrine be denied as to plaintiffs' claims for negligence per se and for violations of 47 U.S.C. § 206, and that such claims not be referred to the FCC at this time; and,..."* [D.C.Dkt. No.117. pg.20].

The alleged fraud can be seen to have corrupted the federal court proceedings is extrinsic fraud and summary judgment on the grounds of collateral estoppel, was in error and should not have been granted by the District Court and Affirmed by the Ninth Circuit Court of Appeal.

QUESTION 3: *Whether Congressional Act, federal statute granting right to private action and federal question, can be preempted by the lower federal courts on the grounds of collateral estoppel for a prior state action by that concerned different defendants, state claims and was tainted by fraud an fraud on the courts.*

Ninth Circuit Court of Appeals
Statement 1

"The district court properly granted summary judgment on the claims of negligence per se and violation of 47 U.S.C. § 206. Those claims were litigated and decided in an earlier state court action brought by some of the plaintiffs here (with whom the remainder are in privity). See Jasso v. Cal. Dep't of Forestry, Superior Court of California, County of Lassen No. 41697; see also First Nat'l Bank v. Russell (In re Russell), 76 F.3d 242, 244-45 (9th Cir. 1996) (describing the elements of collateral estoppel under California law to be: (1) the issue decided in the earlier case is identical to the issue presented, (2) the earlier case culminated in a final judgment on the merits, and (3) the party against whom estoppel is asserted was a party to, or was in privity with a party to, the earlier case).
AFFIRMED. [App.Vol.1. Ex.3. pgs 4,¶3].

District Court Statement 7.

"Defendants' motion for summary judgment, grounded in collateral estoppel, should be granted. Plaintiffs have failed to demonstrate a genuine and material factual dispute as to the elements for application of collateral estoppel doctrine to these claims." [App.Vol.1. Ex.6. pg.36,¶3].
In response to the above statements, the Appellants argue the following.

District Court Statement 8

"C. UNDISPUTED AND DISPUTED FACTS

Defendants proffer 133 undisputed facts, of which plaintiffs agree upon only sixteen. These agreed-upon facts reveal very little about this case,7 and plaintiffs do not offer any others." [App.Vol.1. Ex.6. pgs.18-19].

It is true the plaintiffs disagreed with the any of the defendants undisputed Facts, that in the plaintiffs' opinion were disputable, due to the Fact being either incorrect, irrelevant, immaterial, heresay, or after the fact. They also gave the Court detailed reasons as to why they agreed or disputed each Fact. It is the Appellants' opinion, they did reveal ample information about the case as can be seen below by the just a sampling of some of the Facts.

Defendants Undisputed Fact No. 39.

"*The MPE limits outside the 30-300 Mhz. are less restrictive.*" [D.C.Dkt.No. 192. pg.12].

Plaintiffs answer to Fact No 39.

*"**DISPUTED** and **IRRELEVANT** in that defendants hold licenses and operate frequencies that are in excess of 300 Megahertz (Mhz.) [Ex. 31. pgs. 410-569]. And Plaintiffs OBJECT to the defendants use of lower frequencies that do not reflect the higher microwave, radio and cellular frequencies that are more than 300 Mhz. C.E.C. §350; RULE 402."* [D.C. Dkt.No. 192. pg.12].

Defendants Undisputed Fact No. 40.

"The reason for the more restrictive limits in this range are that the whole body absorption of RF energy by human beings is most efficient in that range; absorption is less efficient at other frequencies, so MPE limits are less restrictive." [D.C. Dkt.No. 192. pg.12].

Plaintiffs answer to Fact No 40.

DISPUTED *and Plaintiffs* ***OBJECT*** *as the statement is misleading as can be seen by the Tissue Dielectric Properties calculator found on the FCC website, the higher the frequency the absorption in certain body organs such as the brain, blood, bone marrow, etc. [Ex. 33, pgs. 743-752].* [D.C.Dkt.No. 192. pg.12].

Defendants Undisputed Fact No. 43.

"The MPE for cellular service is 580 m/W/cm2 (0.000580 W/cm2) and 1000 mW/cm2 for PCS (0.001 W/cm2)." [D.C.Dkt.No. 192. pg.13].

Plaintiffs answer to Fact No 43.

*"**UNDISPUTED** and veritable proof of the extremely high levels of RF radiation being emitted by defendants cellular services at Likely Mountain. According to the Narda website Calculator 580 mW/cm2 equals 1478.69604 V/m (Volts over meters) and 1000 mW/cm2 equals 1941.62303 V/m and pursuant to FCC regulations a maximum of 27.5 V/m is allowed for uncontrolled populations of which class the plaintiffs were at Likely Mountain. [Ex. 36. pgs. 762-767]."* [D.C.Dkt.No.192. pg.13].

Had the District Court considered any part of the defendants' claims in their Undisputed Fact number 43, it would have seen the defendants themselves, stated their cellular antennae emit radiation in excess of 1000 times that allowed by Law. That statement is most certainly a material fact that supports the plaintiffs' claims that the defendants' expert witnesses Richard Williams and Michael Ensminger had not taken into account all the radiation being emitted around the lookout tower.

Additionally, the plaintiffs submitted a Declaration made by Chairman Richard Tell of COMAR, the Institute of Electrical Engineers' (IEEE) Committee on Man and Radiation, declaring he had knowledge of Likely Mountain and explained that it takes high radiofrequency voltage to

cause radiation shocks and burns. [D.C.Dkt.No.191 Attach. #1]. [4] The IEE COMAR Committee is the same Committee that set the standards of human RF radiation exposure in the United States and the same Institute that can be found within the language of Title 47 C.F.R. §1.1310.

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[4] All the plaintiffs have complained about shocks and bruises in both the State and the Federal Court. They did not learn until talking to Chairman Tell in 2007, the shock and bruises were actually radiation burns.

> *"An issue of fact is "material" if, under the applicable substantive law, it might affect the outcome of the case. Allen v. Tyson Foods, 121 F.3d 642, 646 (11th Cir.1997) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Tipton v. Bergrohr GMBH-Siegen, 965 F.2d 994, 998 (11th Cir.1992)). An issue of fact is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party. Id. A court must decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 251, 252, 106 S.Ct. 2505."* **Hickson Corp. v. Northern Crossarm Co., Inc..357 F.3d 1256, 1259 (11th Cir. 2004)**

> *"The rules of collateral estoppel have been addressed by our Supreme Court for at least 140 years. As recently reiterated by that court, "'Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings.'" (Pacific Lumber Co. v. State Water Resources Control Bd. (2006) 37 Cal. 4th 921, 943 (Pacific Lumber), citing Lucido v. Superior Court (1990) 51 Cal.3d 335, 341.) Under*

Pacific Lumber, "[t]he doctrine applies 'only if several threshold requirements are fulfilled.'" (Pacific Lumber, supra, 37 Cal.4th at p. 943.) Inter alia, "'[f]irst, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding.'" (Ibid., italics added.)
The party asserting collateral estoppel bears a "heavy" burden of proving all of these factors (Pacific Lumber, supra, 37 Cal.4th at p. 943) because, as explained by Justice Chin in People v. Garcia (2006) 39 Cal.4th 1070, 1092 (conc. & dis. opn. Chin, J.), citing a number of Supreme Court cases dating from as far back as the Civil War, "'the law does not favor estoppels.' . . . '[c]ertainty is an essential element of every estoppel . . . .' [Citation.] Thus, where a party asserts 'a certain question in issue has been litigated and determined between the same parties in a previous action, it is not enough that the proposed evidence tends to show that the precise question may have been involved in such litigation.' [Citation.] In other words, '"[e]very estoppel must be certain to every intent, and not to be taken by argument or inference." [Citation.] "If upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered in evidence." [Citation.]'" (See also, People v. Frank (1865) 28 Cal.507, 517 ["a party cannot be precluded from giving evidence touching matters directly or collaterally involved in the issue upon the mere suspicion that they have already been determined against him by competent judicial authority; before that can be done it must appear

with certainty that such matters have been so determined" italics added]; Oakland v. Oakland Water Front Co. (1897) 118 Cal.160, 221 ["in the case of a judgment, unless this certainty appear upon the face of the record, the record of the judgment will not constitute an estoppel"].) **Kemp Bros. Construction, Inc. v. Titan Electric Corp. 146 Cal. App.4th. 1474 (2007)." [Appellants' Opposition Dkt. # 190. §41, pgs. 21-22].**

"The standards for granting summary judgment are well-established and exacting. A party is entitled to summary judgment only if it can show "that there is no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law." Fed. R. Civ. Proc. 56(c). In reviewing a motion for summary judgment, a court must evaluate the evidence in the light most favorable to the party opposing the motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986). Summary judgment should not be granted "if the evidence is such that a reasonable jury could return a verdict for the non-moving party."Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In short, when faced with a motion for summary judgment, the court must ask "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52." **[357 F. 3d 1256 - Hickson Corporation v. Northern Crossarm Co Inc. (2004)].**

"Extrinsic fraud is conduct which prevents a party from presenting his claim in court." Wood v. McEwen, 644 F.2d 797, 801 (9th Cir.1981). Under California law, extrinsic fraud is a basis for setting aside an earlier judgment. See Zamora v. Clayborn Contracting Group, Inc., 28 Cal.4th 249, 121

Cal.Rptr.2d 187, 47 P.3d 1056, 1063 (2002)."
Kougasian v. TMSL, Inc., 359 F.3d 1136 (9th Cir. 2004),

"Collateral estoppel should not apply when officers lie or fabricate evidence in state court proceedings."
McCutchen v. City of Monclair, 73 Cal. App 4th 1138, 1147 (1999)." [6]

[6] ***C.P.C. §118(a)*** *Every person who, having taken an oath that he or she will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which the oath may by law of the State of California be administered, willfully and contrary to the oath, states as true any material matter which he or she knows to be false, and every person who testifies, declares, deposes, or certifies under penalty of perjury in any of the cases in which the testimony, declarations, depositions, or certification is permitted by law of the State of California under penalty of perjury and willfully states as true any material matter which he or she knows to be false, is guilty of perjury. This subdivision is applicable whether the statement, or the testimony, declaration, deposition, or certification is made or subscribed within or without the State of California."*
C.P.C. §134 *Every person guilty of preparing any false or antedated book, paper, record, instrument in writing, or other matter or thing, with intent to produce it, or allow it to be produced for any fraudulent or deceitful purpose, as genuine or true, upon any trial, proceeding, or inquiry whatever, authorized by law, is guilty of felony."*

Both the District Court and the Appellees/Defendants have claimed the federal courts have jurisdiction over the defendants and the plaintiffs, pursuant to the following case Law, collateral estoppel cannot be granted by the lower federal courts as the Appellants/Plaintiffs' federal claims of liability under Title 47 §206, §207 and Title 18 §1864, have never been litigated.

"This case is before us on appeal from the district court's dismissal of Eichman's lawsuit on the ground that Eichman's claims were barred by the res judicata effect of an earlier state suit. Because California preclusion law includes the requirement of prior jurisdictional competency, under Marrese v. American Academy of Orthopaedic Surgeons, ---

U.S. ----, 105 S.Ct. 1327, 84 L.Ed.2d 274 (1985), we find that Eichman is not precluded from bringing a federal action when the state court had no jurisdiction to hear Eichman's federal claims. We therefore reverse the district court's dismissal of Eichman's suit." ***Eichman v. Fotomat Corp., 147 Cal. App.3d 170, 197 Cal.Rptr. 612 (1983)."***

QUESTION 4: *Whether the lower federal courts were correct to dismiss plaintiffs Mary Jasso and Illa Garcia, on the grounds of collateral estoppel and privity, for a prior state action that the plaintiffs were barred by State Law from participating in.*

It needs to be noted that both plaintiffs Mary Jasso and Illa Garcia tried to sue the State defendants for Negligence Per Se and Ultrahazardous activities, but their complaints were dismissed the Superior Court on the grounds the Court lacked subject matter jurisdiction, as both women had worked for one of the State defendants at the time they suffered radiation exposure and injury at Likely Mountain and were estopped by State venue Law.

The Appellant Mary Jasso believes she falls under the protection of Title 47 of the United States Code at sections 206 and 207, states an injured party has a right to commence an action against any common carrier that causes them injury, for damages.[5] The First, Fifth, Seventh, and Fourteenth, Amendments, give Appellants the right to petition her Government for a redress of her grievances. A right to due process and equal protection of the Laws. The right to a jury trial and protection from the State or its employees, in violating or denying her due process and equal protection of the Laws, which are federal claims.

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[5] ***"Title 47 U.S.C. "§ 206. Carriers' liability for damages***

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in conse-quence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

Title 47 U.S.C. § 207. Recovery of damages

Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies."

District Court Statement 8.

> *"Mary Jasso and Illa Garcia are also bound by the state court judgments based on their privity with the other plaintiffs. California courts apply the concept of privity where there is "a relationship between the party to be estopped and the unsuccessful party in the prior litigation which is 'sufficiently close' so as to justify application of the doctrine of collateral estoppel." Clemmer v. Hartford Ins. Co., 22 Cal.3d 865, 875 (1978) (citations omitted). "In the context of collateral estoppel, due process requires that the party to be estopped must have had an identity or community of interest with, and adequate representation by, the losing party in the first action as well as that the circumstances must have been such that the party to be estopped should reasonably have expected to be bound by the prior adjudication."17 Id."* [6]

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[6] The Appellees/Defendants judicially noticed several Court documents that either had been dismissed by the State Court, for lack of subject matter jurisdiction, or concerned the question of State Venue,

claiming to the District Court, that plaintiffs Mary Jasso and Illa Garcia had already litigated their civil claims in the state court. Those claims are not true. This Court, itself, in 2007, denied to review the question of State venue. (Case No. 07-604).

In defense Appellant Mary Jasso claims she falls under the protection of Eichman v. Fotomat Corp. (1983)(see pages 29 & 30, this document), and cannot be estopped in federal court from pursuing her federal claims against the defendants or her cause of action for strict liability for ultrahazardous activities, which has never been litigated in any court.

Also none of the following issues have been litigated in a state court.

In regards to plaintiffs Mary Jasso and Illa Garcia;

1. The defendants in this case and plaintiffs Mary Jasso and Illa Garcia, were not part of the prior state court summary judgment. It is both women's belief that if they are barred by the State Courts and they are barred by the Federal Courts from bringing suit under Congressional Act and statute, then their Constitutional rights have been breached by the very courts that have been appointed to protect their Constitutional rights.

In regards to all the federal plaintiffs;

2. Title 47 U.S.C. §206, §207, Negligence Per Se, and Ultrahazardous Activities, have never been litigated in State Court, whereas, common law tort of negligence per se and ultrahazardous activities were not allowed by State Law against State of California defendants, who can only be sued under the California Tort Claims act and Government Code.

3. The Appellees/defendants antennae radiation emissions were not part of the prior state case, considered, nor added to the radiation levels at issue in the prior state case.

4. The State defendants withheld evidence that was not litigated in the prior state action and had the

evidence been disclosed, it would have more probable than not, made a difference in the State court's ruling.

5. The State defendants allegedly, committed fraud and fraud on the State court to escape liability

6. The Federal defendants have come into the Federal District Court with the same alleged fraudulent documents and witnesses that the State defendants used to commit fraud on the State court, obstruct justice and strip the State plaintiffs' of their rights to due process and equal protection of the Laws.

7. The following statue was not litigated in the prior State court case; Title 29 C.F.R. §1910.268(a)(3)(c)(1)(p)(2)(3), requiring the posting of explicit warning signs, complete with phone number that is to be called before you enter the premises where microwave antennae are being used. Allegedly, neither the State or Federal defendants posted any such signs at Likely Mountain.

8. The safe distances for human occupation of the area around the defendants premises, that are required by the Federal Government.

It is Appellants belief that collateral estoppel does not apply to their circumstances or case.

QUESTION 5: *Whether a cause of action for ultra-hazardous activities can be dismissed by the lower federal courts, when the plaintiffs' injuries and the defendants' activities fall under the umbrella of strict liability for ultrahazardous liability pursuant to §460 of the Calfornia Civil Jury Instructions and past California case law.*

Ninth Circuit Statement Two

"The district court dismissed the plaintiffs' claim of strict liability based on ultrahazardous activity. By failing to raise any arguments in their opening brief addressing the district court's ruling on this claim,

the plaintiffs waived this challenge. See Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999)." [App.Vol.1, Ex.3. pg.4,¶2].

The Appellants will not speculate on why the Ninth Circuit Court of Appeals failed to acknowledge twelve of the plaintiffs and failed to read several pages of the Appellants Opening Brief. It is enough to say the Appellants argued or brought forth their cause of action for Ultrahazardous Activities on 10 pages of their Opening Brief. [9th Cir.Dkt.7].

Among the plaintiffs' arguments in their Opening Brief were the following claims.

> *"51. The essential elements of a claim for the doctrine of strict liability for ultrahazardous activities are: (1) The defendant carried on an ultrahazardous activity; (2) Such activity caused plaintiff to suffer injury, damage, loss or harm; and (3) The defendants recognized or should have recognized that plaintiff's person or property was likely to be harmed by the activity or the unpreventable miscarriage of the activity.* [9th Cir.Dkt.7. pg.8,¶3].
>
> ***"7. WHAT LAW SUPPORTS THESE ISSUES ON APPEAL? (YOU MAY BUT NEED NOT REFER TO CASE AND STATUES).*** [9th Cir. Dkt. No. 7. pg. 48].
>
> ***Title 47 USC §206 - 207.*** [9th Cir.Dkt.No. 7. pg.49].
>
> ***Title 18 USC §1864 (Hazardous or injurious devices on Federal lands)*** [9th Cir.Dkt. No.7. pg.49].
>
> ***47 U.S.C. §217.*** *In construing and enforcing the provisions of this chapter, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier or user, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure*

of such carrier or user as well as that of the person. [9th Cir.Dkt.No.7. pg.49].

47 U.S.C. §312(f). "Willful" and "repeated" defined

For purposes of this section:

(1) The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States.

(2) The term "repeated", when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day. [9th Cir.Dkt.No. 7. pg.49].

Title 47 U.S.C. §414*. Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.* [9th Cir.Dkt. No.7.pg.49].

Strict Liability for Ultrahazardous Activities Doctrine (Rest-2d Torts. 4520)." [9th Cir.Dkt.No. 7. pg.52].

District Court Statement 9

"One can hardly dispute defendants' argument that cellular telephone use appears to be ubiquitous. Whether that conclusively defeats plaintiffs' ability to demonstrate that an activity meets the definition of "ultrahazardous" is another matter. While cellular telephones may be in common usage, those are not the devices at issue in this case. Rather, plaintiffs' claims center around the alleged dangers of cellular telecommunication transmission facilities, such as

the one located at Likely Mountain. Moreover, the legal issue of whether an activity is ultrahazardous is, in part, enough of a factual question that the California courts have held that it is not appropriately determined on a motion seeking dismisssal for failure to state a claim. Travelers Indem. Co. v. City of Redondo Beach, 28 Cal.App.4th 1432, 1444 (Cal. Ct. App. 1994) ("Due to the interplay of the various factors, it is impossible to define abnormally dangerous activities. The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability from the harm that results from it, even though it is carried on with all reasonable care. . . Thus, by its very nature, the issue of whether an activity is ultrahazardous cannot be decided on demurrer.").[4]" Likewise, Rule 12(b)(6) is not a proper avenue for testing plaintiffs' evidence in this regard. Rather, the validity of plaintiffs' allegations of an ultrahazardous activity is properly tested under Rule 56 standards, whereby it may be determined if plaintiffs can offer the evidence necessary to prove the claim. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 252 (1986). Accordingly, the motion to dismiss on this ground must be denied. [D.C. Dkt. # 117, pgs. 6-7].

The Appellants injuries and the cause of their injuries, pursuant to the following case law, do meet the necessary elements to maintain a cause of action for strict liability for Ultrahazardous activities against the defendants as can be seen below.

"The doctrine of ultrahazardous activity provides that one who undertakes an ultrahazardous activity is liable to every person who is

*injured as a proximate result of that activity, regardless of the amount of care he uses." (Pierce v. Pacific Gas & Electric Co. (1985) 166 Cal.App.3d 68, 85 [212 Cal.Rptr. 283], internal citations omitted.)..." (Luthringer v. Moore (1948) 31 Cal.2d 489, 496 [190 P.2d 1].)***California Civil Jury Instructions (CACI) §460. Strict Liability for Ultrahazar dous Activities - Essential Factual Elements.* [App.Vol 1. Ex.8. pgs.39-42].

The Appellants/plaintiffs cause of action for strict liability for ultrahazardous activities has never been litigated in any court, be it State or Federal. The only evidence the defendants have brought forward to the District Court (Undisputed Fact No. 43) prove their antennae emits radiation more than one thousand times that allowed by Law and by any definition such activities are ultrahazardous.

STATEMENT OF RELATED CASE

Appellant Mary Jasso, has been dismissed from the District Court and the Ninth Circuit, (Case No. 09-15916). She is also appealing that case before this High Court. The case is against State of California Defendants for civil rights violations and injury on Federal Lands.

CONCLUSION

For all the above reasons, this Petition for a Writ of Certiorari should be granted to the Appellants by this Supreme Court.

"I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on October 25, 2010;

GILBERT TIFFEE DOROTHY M. TIFFEE

MARY A. JASSO

Supreme Court, U.S.
FILED

10-582 OCT 30 2010

No OFFICE OF THE CLERK

In the
SUPREME COURT OF THE UNITED STATES

Gilbert Tiffee, et. al., on behalf of Himself,
and All Others Similarly Situated,

&

Mary A. Jasso, et. al., on behalf of Herself,
And all Others Similarly Situated,
Petitioners in Pro Per

v.

Citizens Telecommunications Co, et al.,
Respondents, et. al.

Vol. 1
Appendix of Exhibits
to accompany
Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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EXHIBIT 1

Ninth Circuit Court of Appeals Mandate, August 10, 2010

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
AUG 10 2010
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

SUZANNE M. AINSLIE; et al.,
Plaintiffs - Appellants,
and
BENJAMIN G. GARCIA; et al.,
Plaintiffs,
v.
CITIZENS TELECOMMUNICATIONS COMPANY OF CALIFORNIA, INC.; et al.,
Defendants - Appellees.

No. 09-15847
D.C. No. 2:05-cv-02649-GEB-EFB
U.S. District Court for Eastern California, Sacramento

MANDATE

The judgment of this Court, entered June 22, 2010, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:
Molly C. Dwyer
Clerk of Court
/s/
Theresa Benitez
Deputy Clerk

EXHIBIT 2

Ninth Circuit Court of Appeals Order,

August 6, 2010

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
MARY A. JASSO; et al.,
Plaintiffs - Appellants,
and
ILLA L. GARCIA; et al.,
Plaintiffs,
v.
UNITED STATES FOREST SERVICE,
United States Department of Agriculture;
et al.,
Defendants - Appellees.
FILED
AUG 06 2010
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS
No. 08-17582
D.C. No. 2:07-cv-02769-GEBEFB
Eastern District of California,
Sacramento
ORDER
Before: RYMER, McKEOWN and PAEZ, Circuit Judges.
Appellants' petition for panel rehearing is denied.
No further filings shall be accepted in this closed case.

EXHIBIT 3

Ninth Circuit Court of Appeals Memorandum,

June 22, 2010

This disposition is not appropriate * for publication and is not precedent except as provided by 9th Cir. R. 36-3.
** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

09-15847

FILED
JUN 22 2010
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SUZANNE M. AINSLIE; et al.,
Plaintiffs - Appellants,
and
BENJAMIN G. GARCIA; et al.,
Plaintiffs,
v.
CITIZENS TELECOMMUNICATIONS COMPANY OF CALIFORNIA, INC.; et al.,
Defendants - Appellees.

No. 09-15847

D.C. No. 2:05-cv-02649-GEBEFB

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Garland E. Burrell, Jr., District Judge, Presiding

Submitted May 25, 2010**

Before: CANBY, THOMAS, and W. FLETCHER, Circuit Judges.

2 09-15847

Two individuals formerly employed as fire lookouts, and members of their families, appeal pro se from the district court's judgment in their action claiming that defendants caused them to be exposed to electromagnetic radiation in excess of federally-permissible limits and thereby violated 47 U.S.C. § 206 and California state law. We have jurisdiction under 28 U.S.C. § 1291. We review de novo.

Proctor v. Vishay Intertechnology, Inc., 584 F.3d 1208, 1218 (9th Cir. 2009). We affirm.

The district court dismissed the plaintiffs' claim of strict liability based on ultrahazardous activity. By failing to raise any arguments in their opening brief addressing the district court's ruling on this claim, the plaintiffs waived this challenge. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999).

The district court properly granted summary judgment on the claims of negligence per se and violation of 47 U.S.C. § 206. Those claims were litigated and decided in an earlier state court action brought by some of the plaintiffs here (with whom the remainder are in privity). *See Jasso v. Cal. Dep't of Forestry*, Superior Court of California, County of Lassen No. 41697; *see also First Nat'l Bank v. Russell (In re Russell)*, 76 F.3d 242, 244-45 (9th Cir. 1996) (describing the elements of collateral estoppel under California law to be: (1) the issue decided in the earlier case is identical to the issue presented, (2) the earlier case culminated in a final judgment on the merits, and (3) the party against whom estoppel is asserted was a party to, or was in privity with a party to, the earlier case).

AFFIRMED.

EXHIBIT 4

Filed March 31, 2009
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
SUZANNE M AINSLIE, ET AL.,
v.
CITIZENS TELECOMMUNICATIONS
COMPANY OF CALIFORNIA, INC., ET AL.,
JUDGMENT IN A CIVIL CASE
CASE NO: 2:05-CV-02649-GEB-EFB

XX — Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
THAT JUDGMENT IS HEREBY ENTERED IN
ACCORDANCE WITH THE
COURT'S ORDER OF 03/31/09
Victoria C. Minor
Clerk of Court
ENTERED: March 31, 2009
by: /s/ A. Benson
Deputy Clerk

EXHIBIT 5

Filed 03/31/09
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
MARY A. JASSO, et al.,
Plaintiffs, 2:05-cv-2649-GEB-EFB-PS
vs.
CITIZENS TELECOMMUNICATIONS
COMPANY OF CALIFORNIA, INC., et al.,
Defendant. ORDER
_____/

On March 11, 2009, the magistrate judge filed findings and recommendations herein which were served on the parties and which contained notice that any objections to the findings and recommendations were to be filed within ten days. Plaintiffs filed objections on March 25, 2009, and they were considered by the undersigned.

This court reviews de novo those portions of the proposed findings of fact to which objection has been made. 28 U.S.C. § 636(b)(1); McDonnell Douglas Corp. v. Commodore Business Machines, 656 F.2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982). As to any

portion of the proposed findings of fact to which no objection has been made, the court assumes its correctness and decides the motions on the applicable law. See Orand v. United States, 602 F.2d 207, 208 (9th Cir. 1979). The magistrate judge's conclusions of law are reviewed de novo. See Britt v. Simi Valley Unified School Dist., 708 F.2d 452, 454 (9th Cir. 1983).

Plaintiffs' objections raise only two issues that warrant comment. First, they assert that the Magistrate Judge overlooked readily available evidence supporting their central contention that radiation emission levels exceeded maximum standards. They cite to their Exhibits 15 and 16 (Dckt. No. 190-2, at pp. 101 to 108) as direct evidence in support of their allegation that defendants' radiation emissions on Likely Mountain exceeded maximum permitted exposure standards during the relevant time period, 1992 to 2002. Plaintiffs' Objections, at ¶ 7. This evidence consists of plaintiffs' calculations, using a program offered by an amateur radio club, of estimated radiofrequency power densities emitted from the antennae of two defendants, utilizing data from the latters' FCC licensing information, and plaintiff's estimation of variables such as "distance to the area of interest." This evidence, calculated in 2008, is not only theoretical but irrelevant to the time period at issue.

Second, plaintiffs assert that it is inappropriate to apply collateral estoppel to the instant action, filed against private telecommunication carriers, because the underlying state action challenged only the emissions of California state telecommunication providers, and the only evidence submitted in that action addressed the emissions of those state defendants.[1] Plaintiffs' Objec-

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[1]The Magistrate Judge focused his analysis of collateral estoppel 1 on plaintiff's challenge to the evidence as allegedly fraudulent, rather than inapplicable, as they now contend.

tions, at ¶¶ 9-14. Plaintiffs' objections misstate the evidence before the state court. As set forth in the findings and recommendations, the pivotal issue of fact decided in the state court is that there exists no known scientific or objective measurement of radiation emissions on Likely Mountain for the relevant period, and no subsequent tests have found emissions that that exceed maximum exposure standards.2

Thus, this finding of fact, unrebutted by any tangible evidence presented by plaintiffs in this court, precludes relitigation of the same matter here, regardless of the identity of the defendants.

Accordingly, having reviewed the applicable legal standards and, good cause appearing, the court concludes that it is appropriate to adopt the proposed Findings and Recommendations in full. IT IS THEREFORE ORDERED that:

1. The proposed Findings and Recommendations filed March 11, 2009, are ADOPTED;

2. Defendants' motion for summary judgment, Dckt. No. 170, is GRANTED;

3. Judgment is entered in their favor; and

4. The Clerk is directed to close the case.

Dated: March 30, 2009
s/GARLAND E. BURRELL, JR.
United States District Judge

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2 The subsequent evidence relied upon by the state court – particularly as set forth in the declarations of state engineers Richard Williams and Michael Ensminger – was based upon ambient radio-frequency measurements taken in 2005 and 2006, "everywhere a lookout employee might be considered to have normal access," and necessarily included "co-existing, non-State transmitters at each site," Ensminger Decl. at pp. 5-6 (Dckt. No. 170-5, at ¶¶ 20, 21), that is, "RF energy from sources other than State agencies at or around Likely Mountain," Williams Decl. at p. 6 (Dckt. No. 170-6, at ¶¶ 26, 30). The state court also considered the letter written to plaintiffs by FCC

District Director Thomas VanStavern, which set forth the negative results of FCC testing in 2005, of the areas in which plaintiffs had worked and lived, and involving all communications facilities on the site. As concluded by Mr. VanStavern, the tests measured "no RFR levels at the area surveyed exceeding the Commission's MPE limits for public or occupational use." VanStavern Letter (Dckt. No. 171-2).

EXHIBIT 6

Filed 03/11/2009

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
MARY A. JASSO, et al.,
Plaintiffs, No. CIV S-05-2649 GEB EFB PS
vs.
CITIZENS TELECOMMUNICATIONS FINDINGS AND RECOMMENDATIONS
COMPANY OF CALIFORNIA, INC., et al.,
Defendants.

FINDINGS AND RECOMMENDATIONS

Defendants' motion for summary judgment was submitted for decision on the papers by order of this court entered July 9, 2008.1 For the following reasons, the court recommends that the motion be granted.

BACKGROUND

This is one of several actions, based on the same set of facts, filed by plaintiffs in state and federal court. Defendants removed this action from the Lassen County Superior Court on December 30, 2005. On January 9, 2007, this court dismissed plaintiffs' complaint for failure to state a claim, and accorded plaintiffs leave to file an amended complaint, which they filed on February 2, 2007.

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1 This case, in which the plaintiffs are proceeding *in propria persona*, is referred to the undersigned under Local Rule 72-302(c)(21), pursuant to 28 U.S.C. § 636(b)(1). This case is related to *Illa L. Garcia, et al. v California Department of Forestry and Fire Protection, et al.*, No. Civ. S-07-2770 GEB EFB PS.

Pursuant to their amended complaint, plaintiffs Mary Jasso and Illa Garcia state that they are former employees of the California Department of Forestry and Fire Protection ("CDF") who worked as seasonal lookouts at the "Likely Mountain Lookout" site ("Likely Mountain") in Lassen County, California. Jasso worked seasonally at the site from 1992 to 2002; Garcia worked there from 2000 to 2002. First Amended Complaint ("FAC"), ¶ 24. The additional eleven plaintiffs are family members of Jasso and Garcia who visited or lived with them during their employment at Likely Mountain. FAC at ¶¶ 27, 28. Plaintiffs allege that they sustained injuries as a result of exposure to radiation emitted from defendants' cellular telecommunication facilities and operations at Likely Mountain. FAC at ¶ 20, 18. Defendants are cellular telephone businesses which own, use and/or lease telecommunications facilities located at Likely Mountain. Plaintiffs describe the facilities as telecommunications towers, buildings, antennae, microwave dishes, and cellular panels. FAC at ¶ 18. Plaintiffs allege that defendants have failed to comply with federal regulations concerning the construction, operation and maintenance of their facilities, FAC at ¶¶ 53-59, and as a result plaintiffs have suffered numerous bodily injuries, including cancer, brain damage, and autism.2 FAC at ¶¶ 40, 41, 28.

The amended complaint sets forth three causes of action: (1) a state law claim of negligence per se, premised on defendants' alleged failure to comply with Federal Communications Commission ("FCC") regulations regarding radiofrequency ("RF") emissions; (2) a state law claim of strict liability for ultrahazardous activities; and, (3) liability pursuant to 47 U.S.C. § 206 of the Federal Communications Act ("FCA"), which authorizes damages for personal injury by a common carrier for conduct violating Chapter 5 of Title 47.

On September 13, 2007, this court granted in part defendants' motion to dismiss plaintiffs' amended complaint. The court dismissed plaintiffs' state law ultra-hazardous/strict liability claim on the basis of conflict

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2 On December 31, 2008, plaintiffs filed a Notice informing the court of the December 1, 2008, death of plaintiff Benjamin G. Garcia, husband of plaintiff Illa Garcia. *See* Dckt. No. 209.

preemption by the FCC's regulatory guidelines. However, the court denied defendants' motion, made pursuant to the primary jurisdiction doctrine, as to plaintiffs' state law claim for negligence per se and alleged violation of 47 U.S.C. § 206. The court declined to defer to FCC jurisdiction on these matters on the ground, *inter alia*, that federal regulations establish only the relevant standard of care in assessing a negligence claim; the remaining analysis relative to causation necessarily lies with the courts. *See* Order filed September 13, 2007, adopting Findings and Recommendations filed July 30, 2007.

All defendants filed answers to the amended complaint on October 31, 2007.

On April 7, 2008, defendants Modoc RSA Limited Partnership dba Verizon Wireless, and Cellco Partnership dba Verizon Wireless ("Verizon"), filed the instant motion for summary judgment, which has been joined by defendants Sierra Pacific Power Company, United States Cellular Corporation, California Rural Services Area #1, Union Pacific Railroad Company, Citizens Telecommunications Company of California, Inc., Surprise Valley Electrification Corporation, Valley Industrial Communications, Inc. and Alturas Ranches LLC.

Defendants' motion is premised on defendants' assertion that plaintiffs' claims are barred by collateral estoppel as a result of two decisions rendered by the Lassen County Superior Court.

Plaintiffs filed an opposition and motion to strike certain evidence proffered by defendants.

LEGAL STANDARDS

A. Summary Judgment Summary judgment pursuant to Fed. R. Civ. P. 56 avoids unnecessary trials in cases with no disputed material facts. *Northwest Motorcycle Ass'n v. United States Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994). At issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). Two steps are necessary. First, according to the substantive law, the court must determine what facts are material. Second, in light of the appropriate standard of proof, the court must determine whether material factual disputes require resolution at trial. *Id.*, at 248.

When the opposing party has the burden of proof on a dispositive issue at trial, the moving party need not produce evidence which negates the opponent's claim. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 885 (1990). The moving party need only point to matters which demonstrate the absence of a genuine material factual issue. *Celotex v. Cattret*, 477 U.S. 317, 323-24 (1986).

If the moving party meets its burden, the burden shifts to the opposing party to establish genuine material factual issues. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The opposing party must demonstrate that disputed facts are material, i.e., facts that might affect the outcome of the suit under the governing law, *Anderson*, 477 U.S. at 248; *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987), and that disputes are genuine, i.e., the parties' differing versions of the truth require resolution at trial, *T.W. Elec.*, 809 F.2d at 631. The opposing party may not rest upon the pleadings' mere allegations or denials, but

must present evidence of specific disputed facts. *Anderson*, 477 U.S.at 248. 3 Conclusory statements cannot defeat a properly sup-ported summary judgment motion. *Scott v. Rosenberg*, 702 F.2d 1263, 1271-72 (9th Cir. 1983).

The court does not determine witness credibility. It believes the opposing party's evidence, and draws inferences most favorably for the opposing party. *Anderson*, 477 U.S. at 249, 255. Inferences, however, are not drawn out of "thin air," and the proponent must adduce evidence of a factual predicate from which to draw inferences. *American Int'l Group, Inc. v. American Int'l Bank*, 926

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3 A verified complaint may be used as an affidavit in opposition to the motion. *Schroeder v McDonald*, 55 F. 3d 454, 460 (9th Cir. 1995); *McElyea v. Babbitt*, 833 F.2d 196, 197-98 (9th Cir. 1987) (per curiam).

F.2d 829, 836 (9th Cir.1991) (Kozinski, J., dissenting) (citing *Celotex*, 477 U.S. at 322).

If reasonable minds could differ on material facts at issue, summary judgment is inappropriate. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995). On the other hand, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (citation omitted). In that case, the court should grant summary judgment.

B. Collateral Estoppel

"Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Dodd v. Hood River County*, 59 F.3d 852, 863 (9th Cir. 1995). "'[T]he doctrine of collateral estoppel can apply to preclude relitigation of both issues of law and issues of fact if those issues were conclusively determined in a prior

action.' *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 170-71 [](1984)." *Steen v. John Hancock Mut. Life Ins. Co.*, 106 F.3d 904, 910 (9th Cir. 1997).

"In determining the collateral estoppel effect of a state court judgment, federal courts must, as a matter of full faith and credit, apply that state's law of collateral estoppel. 28 U.S.C. § 1738; *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481-82(1982)." *In re Bugna*, 33 F.3d 1054, 1057 (9th Cir. 1994). Under California law, the following requirements must be satisfied in order to find collateral estoppel: "1) the issue to be precluded must be identical to that decided in the prior proceeding; 2) the issue must have been actually litigated at that time; 3) the issue must have been necessarily decided; 4) the decision in the prior proceeding must be final and on the merits; and 5) the party against whom preclusion is sought must be [the same as or] in privity with the party to the former proceeding." *People v. Garcia*, 39 Cal.4th 1070, 1077 (2006); *see also Lucido v. Superior Court*, 51 Cal.3d 335, 341 (1990).

EVIDENTIARY ISSUES

Evidence, regardless of form, that may be admissible at trial, may also be considered on summary judgment. *Burch v. Regents of the University of California*, 433 F.Supp. 2d 1110, 1120 (E. D. Cal. 2006) (*citing Celotex*, 477 U.S. at 324). In a motion for summary judgment based on res judicata or collateral estoppel, "[w]hen the moving party has 'introduce[d] a record sufficient to reveal the controlling facts and pinpoint the exact issues litigated in the prior action,' there is no need for the entire record of the prior litigation to be submitted into evidence. *Hernandez v. City of Los Angeles*, 624 F.2d 935, 937 (9th Cir. 1980). *See also Jones v. Gann*, 703 F.2d 513, 515 (11th Cir.1983) (res judicata defense may be raised 'by introducing sufficient information into the record to allow the court to judge the validity of ... the defense')." *Takahashi*

v. Board of Trustees of Livingston Union School Dist., 783 F.2d 848, 850 (9th Cir. 1986).

A. DEFENDANTS' REQUEST FOR JUDICIAL NOTICE

With the exception of Defendants' Exhibit A, discussed *infra*, defendants' request for judicial notice is limited to official court records, including pleadings submitted therein. The court may judicially notice matters of public record, including pleadings, orders, and other papers filed with the court. *Mack v. South Bay Beer Distributors*, 798 F.2d 1279, 1282 (9th Cir. 1986). Additionally, "[m]aterials from a proceeding in another tribunal are appropriate for judicial notice." *Doran v. Aus*, __ F.3d __, 2009 WL 123608, *1 (9th Cir. 2009). While plaintiffs challenge defendants' construction of, and reliance on, these documents, they do not challenge defendants' request that the documents be judicially noticed.

Accordingly, defendants' request for judicial notice of the documents enumerated below4 is granted.

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4 The court judicially notices the following documents (*see* Defendant Verizon's Request for Judicial Notice, Dckt. No. 170-3, Decl. of Todd Noonan, Dckt. No. 170-6, and Appendix of Exhibits, Dckt. Nos. 171 and 172):

1. Defendants' Exhibit D, the October 30, 2007 Order of the Lassen County Superior Court, granting summary judgment in favor of the State of California defendants, specifically, the Department of General Services, Department of Fish and Game, Department of Forestry and Fire Protection, and Highway Patrol. Case No. 41697.
2. Defendants' Exhibit E, the October 31, 2007 Order of the Lassen County Superior Court, granting summary judgment in favor of defendant California Department of Transportation. Case Nos. 41697, 42423, 42424, 42426, 42601, 42602, 42603, 42604, 42605, 42606, 42616.
3. Defendants' Exhibit F, the November 29, 2005 Order of the Lassen County Superior Court, granting the motion of the state defendants to strike plaintiffs' original complaint. Case No. 41697.
4. Defendants' Exhibit G, the Lassen County Superior Court Docket Sheet for Case No. 41697.

5. Defendants' Exhibit H, the originally filed complaint in Lassen County Superior Court Case Nos. 41697, 42197, 42554, 42601, 42426, 42603, 42616, 42423, 42606, 42605, 42424, 42604, 42425, and 42602, dated July 25, 2005.
6. Defendants' Exhibit I, the Second Amended Complaint of Timothy E. Ainslie from Lassen County Superior Court Case No. 42601, dated June 8, 2006.
7. Defendants' Exhibit J, reflecting official records of the California Court of Appeal, Third District, specifically, Case Summary, Docket Sheet, Disposition, and List of Parties and Attorneys from *Jasso v. Department of Forestry, et al.*, Case No. C053793 (Trial No. 41697).
6. Defendants' Exhibit K, reflecting official records of the California Court of Appeal, Third District, specifically, Case Summary, Docket Sheet, Disposition, and List of Parties and Attorneys from *Garcia v. Department of Forestry, et al.*, Case No. C053667 (Trial No. 42425).
7. Defendants' Exhibit L, providing the California Supreme Court Case Summary, Docket Sheet, Disposition, and List of Parties and Attorneys in *Garcia v. Department of Forestry, et al.*, Case No. S153684 (CO No. 53667, 53793).
8. Defendants' Exhibit M, the United States Supreme Court Docket Sheet from *Garcia, et al. v. Department of Forestry, et al.*, Case No. 07-604 (CO No. 53667, 53793).
9. Defendants' Exhibit N, reflecting official records of the California Court of Appeal, Third District, specifically, Case Summary, Docket Sheet, Disposition,
and List of Parties and Attorneys from *Jasso v. Superior Court of Lassen County*, CO No. 57462.
10. Defendants' Exhibit O, providing the California Supreme Court Case Summary, Docket Sheet, Disposition, and List of Parties and Attorneys from *Jasso v. Superior Court of Lassen County*, Case No. S159350 (CO No. 57462).
11. Defendants' Exhibit P, a Notice of Related Cases, dated November 15, 2005, and filed by Plaintiffs Mary A. Jasso, et al. in Lassen County Superior Court Case Nos. 41697 and 42197.
12. Finally, although defendants do not make the request, the court judicially notices defendants' later filed Exhibit Y, a copy of plaintiffs' Motion for a Peremptory Writ of Mandate, filed November 28, 2007 in the California Court of Appeals, Third District, Case No. 41697. *See* Decl. of Todd Noonan, Dckt. No. 197.

B. PLAINTIFFS' MOTION TO STRIKE

Plaintiffs object to the admission of five documents submitted by defendants, three reports of scientific test results, and two supporting declarations.5 The grounds for each objection are the same: "Irrelevant" (citing Cal. Evid. Code §§ 350-351), "Immaterial" (citing Fed. R. Evid. §§ 402-403), and "After the Fact" (Fed. R. Evid. § 407). *See* Plaintiffs' Objection and Motion to Strike ("Motion to Strike"), Dckt. No. 191, and Plaintiffs' Proposed Order, Dckt. No. 195.

Plaintiffs' objections broadly challenge the substance, veracity and probative value of the scientific documents, and the honesty of the declarants. Plaintiffs argue that the scientific documents fail to describe the conditions on Likely Mountain during plaintiffs' presence, and that the supporting affidavits are "fraudulent [and] misleading." Motion to Strike, at p. 2.

Plaintiffs contend that the "acceptance of these allegedly false documents would be a major waste of the court[']s time and would open the defendants to an action of submitting and filing false evidence, collusion, perjury, and bad faith." *Id.*

Of the challenged documents, defendants seek judicial notice of only Exhibit A, the Van Stavern letter setting forth the findings of the FCC, based on testing conducted July 26, 2005 and December 6, 2005. It appears that defendants seek judicial notice of Exhibit A, but not similar Exhibits B and C (state test results), because the latter are directly authenticated by the Esminger and Williams declarations and, moreover, these test results and declarations were separately submitted by plaintiffs. *See* Plaintiffs' Exhibits B and C to Decl. of Raymond Singer, Ph.D., Dckt. No. 193; *see also* Plaintiffs' Exhibits 2-5, 11.

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5 Plaintiffs object to the admission of the following five documents: (1) Declaration of Richard Williams, Senior Telecommunications Engineer, California Department of General Services,

Telecommunications Division (Dckt. No. 170-5); (2) Declaration of Michael D. Ensminger, Associate Telecommunications Engineer, California Department of General Services, Telecommunications Division (Dckt. No. 170-4); (3) FCC tests and surveys conducted July 26, 2005 and December 6, 2005, and set forth in a March 8, 2006 letter from FCC San Francisco District Director Thomas VanStavern to Modoc National Forest personnel (Dckt. No. 171-2, Defendants' Exh. A to Noonan Decl.); (4) State survey test results conducted February 2, 2005 (Dckt. No. 171-3, Defendants' Exh. B to Noonan Decl.); and (5) State survey test results conducted September 20, 2006 (Dckt. No. 171-4, Defendants' Exh. C to Noonan Decl.)

See, e.g., Canada v. Blain's Helicopters, Inc., 831 F.2d 920, 925 (9th Cir. 1987) ("documents which have not had a proper foundation laid to authenticate them cannot support a motion for summary judgment"). Defendants state that they obtained the Van-Stavern letter from the Lassen County Superior Court in November 2007, as Attachment A to the Declaration of Mr. Van Stavern in support of the motion for summary judgment filed by the California Department of Transportation in *Jasso v. Cal. Dept. of Forestry and Fire Protection* (consolidated cases). *See* Defendants' Request for Judicial Notice, Dckt. No. 170-3, at p. 2. Defendants' Exhibit A does not present an authentication issue. Plaintiffs do not contend that the VanStavern letter is anything other than what defendants say it is. Plaintiffs do not refute that it was submitted in the state court action pursuant to the declaration of Mr. VanStavern; in fact, plaintiffs have submitted a copy of that authenticating declaration (*see* Plaintiffs' Exh. 11). Rather, as with their challenges to the other test data and declarations, plaintiffs challenge its substance.

Nonetheless, contrary to defendants' assertion that the VanStavern letter meets the requirements for judicial notice pursuant to Federal Rule of Evidence 201(b)(2) ("capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be question-

ed"), *see* Defendants' Memorandum, at p. 15, n. 9, the letter contains neither adjudicative or legislative facts.6 The only basis for judicially noticing the letter is to acknowledge that it is what it purports to be, that it was expressly relied upon by the Superior Court, and that it is part of defendants' evidence in support of their motion for summary

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6 Adjudicative facts are "usually those facts that are in issue in a particular case," and are generally known or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be disputed." *Korematsu v. United States*, 584 F. Supp. 1406, 1414 (N.D. Cal. 1984). Legislative facts are "established truths, facts or pronouncements that do not change from case to case but are applied universally." *Id.* at 1414. These are facts that a court may take notice of when interpreting a statute or considering commercial standards, for example. *Id.* Under this rubric, the items included in plaintiffs' requests do not qualify as appropriate "facts" to be judicially noticed.

judgment. Accordingly, defendants' request for judicial notice of their Exhibit A is granted subject to these limitations.

Plaintiffs' broader challenge to the five documents representing the heart of defendants' motion will be overruled. The substance of this evidence, relied on by the superior court, must be considered in evaluating defendants' collateral estoppel argument. Plaintiffs' objections, including their allegations of fraud, are properly assessed in the context of determining the appropriateness of summary judgment. Plaintiffs' challenge to this evidence is one of sufficiency, not admissibility. *Burch, supra,* 433 F.Supp. 2d at 1119. "[O]bjections to evidence on the ground that it is irrelevant, speculative, and/or argumentative, or that it constitutes an improper legal conclusion are all duplicative of the summary judgment standard itself. . . .

Instead of objecting, parties should simply argue that the facts are not material." *Id.*

C. UNDISPUTED AND DISPUTED FACTS

Defendants proffer 133 undisputed facts, of which plaintiffs agree upon only sixteen. These agreed-upon facts reveal very little about this case,7 and plaintiffs do not offer any others.

7 Plaintiffs agree that only the following of defendants' profferred facts are undisputed:
No. 6: After plaintiffs Mary Jasso and Illa Garcia were dismissed from the state court case cases, the remaining plaintiffs proceeded to defend against the State's motions for summary judgment.
No. 18. Plaintiffs May Jasso and Illa Garcia have familial relationships with several of the plaintiffs who were directly subject to the Lassen County court's summary judgment ruling.
No. 22. Likely Mountain is owned by the United States Department of Agriculture Forest Service and facilities leased to, among others, the State of California, U.S. Cellular, and Citizens' Communications.
No. 23. The State of California owns and operates two towers and one radio vault at Likely Mountain.
No. 24. One of the State's towers is a structure with a stairway (with handrail), cab and catwalk used by the California Department of Forestry employees like plaintiffs Mary Jasso and Illa Garcia to spot forest fires.
No. 25. Mounted on that tower are three microwave antennas operated by the State, which face outward toward the tower.
No. 28. Also formerly at the site was a metal trailer where CDF employees allegedly lived while working at Likely Mountain.
No. 29. Two other towers are owned by Citizens Communications (Frontier) and U.S. Cellular on land leased from the U.S. Government.

Plaintiffs' objections to defendants' remaining undisputed facts on grounds of irrelevance, "after the fact," misleading and heresay [*sic*] are, in general, confounding. For example, plaintiffs dispute the fact as well as the substance of state court decisions on the ground that they allegedly rest on fraudulent evidence. Plaintiffs challenge the relevance of defendants' scientific evidence on the ground that it was obtained "after the fact," yet plaintiffs both argue and concede there is no contemporaneous information. As discussed below, plain-

tiffs' narrow view of the facts is self-defeating. The essential unavailability of direct evidence cannot be transformed into a material factual dispute.

For the reasons set forth below, this court finds that plaintiffs' claims are barred by collateral estoppel. Since the court does not weigh, *de novo*, the evidence before it, it need not separately analyze plaintiffs' objections to more than one hundred of defendants' proffered undisputed facts.

No. 31. The Frontier and U.S. Cellular towers are approximately 65 feet apart, east of the lookout tower.
No. 34. National standards established by the IEE, FCC and NCRP have set the MPE for controlled/occupational environments equal to one-tenth of the harm threshold and equal to one fiftieth on the harm threshold for uncontrolled/public environments.
No. 36. Uncontrolled environments exist where the general public might be exposed or where employees are not aware of the potential for exposure or are unable to control their exposure.
No. 43. The MPE for cellular service is 580 mW/cm2 (0.000580 W/cm2), and 1000 mW/cm2 for PCS (0.001 W/cm2).
No. 59. At the time of the February 2, 2005 testing, all State radio transmitter equipment (except three microwave transmitters) was turned off and measurements for ambient RF levels were taken.
No. 92. State frequencies that were activated for the purpose of making MPE measurements were: 42.08, 42.34, 47.10, 151.415, 153.755, and 858.9875 MHZ.
No. 122. On May 10, 2004, plaintiff Mary Jasso filed an informal complaint with the FCC's Office of Engineering and Technology alleging that she was experiencing ill health effects due to exposure to RF at Likely Mountain.
No. 133. When performing direct measurement in order to determine compliance with FCC's RF guidelines, all significant contributors to the ambient RF environment should be considered, including those otherwise excluded from performing routine RF evaluations.

ANALYSIS

A. PLAINTIFFS' REMAINING CLAIMS

Plaintiffs' remaining claims are (1) state law claim for negligence per se, and (2) violation of 47 U.S.C. § 206,

which authorizes damages for personal injury by a common carrier for conduct violating Chapter 47. As explained below, both claims rest on plaintiffs' principal contention that defendants exceeded, during plaintiffs' tenure on Likely Mountain, the maximum permissible emission standards established by federal regulations.

1. Negligence Per Se

Under California law, "[t]he negligence per se doctrine is codified in Evidence Code section 669, under which negligence is presumed if the plaintiff establishes four elements: (1) the defendant violated a statute, ordinance, or regulation of a public entity; (2) the violation proximately caused death or injury to person or property; (3) the death or injury resulted from an occurrence of the nature of which the statute, ordinance, or regulation was designed to prevent; and (4) the person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted. The first two elements are normally questions for the trier of fact, while the latter two elements are determined by the trial court as a matter of law. *Galvez v. Frields*, 88 Cal.App.4th 1410, 1420 (2d Dist. 2001) (citation omitted).

Application of this standard to the present case requires a threshold finding that defendants violated "a statute, ordinance, or regulation" creating a standard of care owed these plaintiffs. *See, e.g., Rice v. Center Point, Inc.*, 154 Cal.App.4th 949, 959 (1st Dist. 2007) ("[f]or the presumption to come into play, either the courts or the Legislature must have created a duty of care") (citation and internal quotations omitted). Plaintiffs claim that defendants owed them the duty of care prescribed by the FCC's regulations and guidelines, particularly the maximum permissible exposure standards set forth in 47 C.F.R. §§ 1.1305, 1.1307(b), 1.1310; and "OET Bulletin 65," issued by the FCC Office of Engineering and Tech-

nology, and entitled "Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields" (Aug. 1997). See FAC ¶ 45. Plaintiffs further claim that defendants "did not obey the aforementioned statu[t]e, bulletin and erratum, *supra*, and breached their mandatory and/or statutory duty to protect and/or warn the plaintiffs of the hazardous environment and harmful radiation fields created by their telecommunications use, operations and antennae, at LMTF, and as a direct and as a proximate result of the defendants[] failure to follow relevant statu[t]e, regulations and guidelines and their omissions and failure to warn[], plaintiffs suffered bodily injury and other damages." FAC ¶ 46. Thus, before addressing causation, plaintiffs must establish the relevant standard of care and demonstrate its breach by these defendants.

2. Violation of 47 U.S.C. § 206

Section 206, Title 47, of the United States Code,8 renders a common carrier9 liable for damages for doing anything prohibited, or failing to do anything required, by Chapter 5 of Title 47.10 Section 207 authorizes any person claiming damages pursuant to § 206 to make a complaint to the FCC, or to bring suit for damages in district court.11 Plaintiffs rely on the same

8 47 U.S.C. § 206 provides in full: "In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

9 The FCA defines "common carrier" as "any person engaged as a common carrier for hire, in interstate or foreign communication by

wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." 47 U.S.C. § 153(10). Defendants do not dispute that they qualify as common carriers as defined under the Act.

10 Chapter 5 of Title 47, to which section 206 applies, encompasses provisions §§ 151 through 699, relative to "Wire or Radio Communication."

11 47 U.S.C. § 207 provides in full: "Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for provisions set forth in their negligence claim – in 47 C.F.R. §§ 1.1305, 1.1307(b), 1.1310; and OET Bulletin 65 – to support their claim for damages pursuant to these statutes, premised on a theory of strict liability. *See* FAC ¶¶ 54, 59. The threshold requirement is met – these regulations were promulgated pursuant to the authority of, *inter alia*, Chapter 5 of Title 47.

B. Collateral Estoppel

1. State Court Decisions

Defendants contend that collateral estoppel bars plaintiffs' claims because their resolution turns on a fundamental issue decided adversely to plaintiffs in state court. In October 2007, the Superior Court of California, County of Lassen, issued decisions in two other cases filed by plaintiffs, granting summary judgment to the state agency defendants on the ground they had met their burden of demonstrating that exposure levels on Likely Mountain did not exceed federal standards. These decisions,12 both rendered by the Honorable Stephen Bradbury, share the following identical reasoning:

> *It appears that the controlling issue revolves around and is determined by the fact of whether Radio Frequency Radiation was at a level that could cause plaintiffs' damages. The determination is one of scientific evidence. The scientific and objective tests that have been performed, after the fact, show*

that the RFR levels were lower than maximum permissible exposure, except for one area by the handrail of the tower, which was at 100% of the maximum permissible exposure, but did not exceed it. As noted by plaintiffs, none of the tests were done at or near the times plaintiffs were present.

However, the scientific and objective tests are the only known measurements of RFR at the site. Though plaintiffs offer anecdotal evidence from which they infer that the RFR levels may be higher while they were present, such as shocks handrail and neurological deficits all experience, they have produced no evidence that the RFR raised to a level exceeding the maximum permissible exposure limits. The question as to this, then, is whether anecdotal evidence – as interpreted by plaintiffs – rises to a level of circumstantial evidence which is to be decided by a trier of fact in trial. The court's conclusion is that is does not: there is no scientific evidence or testimony showing that the RFR at Likely Mountain was ever over the MPE. Plaintiffs' contention rests upon speculation that this might have occurred if one considers the TV antenna and FM antenna, not a part of defendant State's equipment, which is located at the site. Even plaintiffs' expert, Mr. Moore, has no tangible evidence to support the contention. It is, upon analysis, speculation which cannot be presented to a trier of fact, since a finding of liability cannot be based upon speculation.

Defendants have met their evidentiary burden for summary judgment by showing that the RFR did not exceed the Maximum Permissible Exposure (MPE). The burden then shifts to plaintiffs to show

that a triable issue of fact exists regarding the question of fact whether the RFR exceeded the MPE. Plaintiffs have failed to do so.
Since the RFR did not rise to a level that would cause damage to a plaintiff, defendants are entitled by law to summary judgment of plaintiffs' causes of action based on: Failure to assess and warn under Title 8 of California Code of Regulations section 8616; Title 47 Code of Federal Regulations section 1.1307(b); and, dangerous condition of public property under Government Code section 835.

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on the which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies."

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12 *See* Superior Court of California, County of Lassen, Case No. 41697 (Mary A. Jasso v. California Department of Forestry et al.), Order on Defendants' Motion for Summary Judgment filed October 30, 2007, Defendants' Exh. D; and Superior Court of California, County of Lassen, Case Nos. 41697, 42423, 42424, 42426, 42601, 42602, 42603, 42604, 42605, 52606, 42616 (Consolidated) (Higinio Rojo Jasso, et al. v. California Department of Forestry and Fire Protection, et al.), Order on Defendants' Motion for Summary Judgment filed October 31, 2007, Defendants' Exh. E.

2. Identity of Claims

The controlling issue decided by the Lassen County Superior Court is identical to the central issue in this case, specifically, whether radiofrequency radiation levels on Likely Mountain exceeded federal maximum permissible exposure ("MPE") standards. Absent some evidence that the duty of care established by the federal MPE standards was breached, plaintiffs are precluded from recovery under 47 U.S.C. § 206, and foreclosed from

presenting further evidence in support of their negligence per se claim, viz., causation.

Federal MPE standards for RF exposure are set forth in the regulations and FCC bulletin cited both by plaintiffs and defendants. The FCC's maximum permissible exposure limits in controlled and uncontrolled environments are set forth in 47 C.F.R. § 1.1310 (Table). Plaintiffs contend, and defendants concede for present purposes only, that the more restrictive limits applicable to uncontrolled or "public" areas should apply. *See* Opposition, at ¶ 60; *see* Defendants' Memorandum, at p. 7, and their Reply, at p. 14. The most restrictive MPE limits for an uncontrolled environment applies at frequencies between 30 and 300 MHZ, and are set at an electronic field strength of 0.2 mW/cm2, and power density of 27.5 V/m, regardless of duration of exposure. 47 C.F.R. § 1.1310 (Table); *see also*, Defendants' Exh. A, at 1, and Defendnts' Exh. B, at 1. Cellular telephone services operate in the 800-900 MHZ range, *see* 47 C.F.R. § 22.905, and are thus subject to less restrictive MPE standards. 47 C.F.R. § 1.1310 (Table). The parties do not dispute that all existing test results, *on their face*, show radiofrequency radiation substantially under the most restrictive MPE limits.

The controlling issue presented in this litigation, albeit against private entities, is identical to that resolved against plaintiffs in the state action, wherein plaintiffs claimed that defendant state agencies therein: (1) failed to assess and warn plaintiffs of the challenged hazards (citing 8 Cal. Code. Reg. § 8616 (state OSHA requirements)), and 47 C.F.R. § 1.1307(b) (requiring environmental assessment of operations that could cause radiation exposure in excess of the limits set forth in § 1.1310)), and (2) negligently failed to protect plaintiffs from injury (citing Cal. Gov't Code § 835). Absent a showing that the radiation exposure on Likely Mountain exceeded minimal

standards, plaintiffs could not state a claim under these provisions.

The same is true of plaintiffs' claims before this court. "If, in the course of adjudicating a state-law question, a state court should determine factual issues using standards identical to those [that would be used in federal court], then collateral estoppel, in the absence of countervailing statutory policy, would bar relitigation of those issues." *Brown v. Felsen*, 442 U.S. 127, 139, n. 10 (1979).

3. Actually Litigated and Necessarily Decided

An issue has been "actually litigated" when it "is properly raised, by the pleadings or otherwise, is submitted for determination, and is determined." *Barker v. Hull*, 191 Cal.App.3d 221, 226 (1st Dist. 1987)(citing *Rest.2d Judgments*, § 27, p. 250). "As a conceptual matter, if an issue was necessarily decided in a prior proceeding, it was actually litigated." *In re Harmon*, 250 F.3d 1240, 1248 (9th Cir. 2001) (but noting that "[t]he converse proposition, by contrast, is not true. An issue may actually have been litigated without its determination having been necessary to the court's decision" (*id.* at n. 9)). Whether an issue was "'necessarily decided' has been interpreted to mean that the issue was not ' "entirely unnecessary" ' to the judgment in the prior proceeding." *Murphy v. Murphy*, 164 Cal.App.4th 376, 400 (1st Dist. 2008) (citation omitted); *see also Lucido v. Superior Court*, 51 Cal.3d 335, 342 (1990).

The controlling issue raised, opposed, submitted for decision, and decided, in the Lassen Superior Court cases is whether the RF radiation on Likely Mountain exceeded federal MPE standards during the period 1992 to 2002. This issue was resolved in the state cases, as it is must be here, based on the only known and available measurements at the site. While these measurements were taken after the relevant period, providing only circumstantial

evidence of radiation levels during the relevant period of time,13 the absence of direct evidence does not create a material factual dispute requiring resolution at trial.

Plaintiffs contend that the question of exposure levels on Likely Mountain was not actually litigated or necessarily decided by the state court because the evidence before that court was "false, misleading and/or included perjured statements." Opposition, at ¶ 8. Plaintiffs assert that they "did not learn until after the state summary judgment hearing held October 22, 2007, that State Defendants had allegedly suppressed evidence that when investigated would allegedly show the test reports and declarations submitted to the Superior Court were false, misleading and perjured." *Id.* at ¶ 12. Specifically, plaintiffs "were not able at the time of the hearing, to counter State defendants' engineers Richard Williams and Michael Ensminger's test reports and declarations and the declaration of Mr. Thomas Van Stavern, an employee of the Federal Communications Commission." *Id.* at ¶ 11 (citing each of these documents in plaintiffs' own 13 Circumstantial and direct evidence may be equally relied upon. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) ("The reason for treating circumstantial and direct evidence alike is both clear and deep rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.' *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508, n. 17 [] (1957)."). exhibits).

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13 Circumstantial and direct evidence may be equally relied upon. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) ("The reason for treating circumstantial and direct evidence alike is both clear and deep rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.' *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508, n. 17 [] (1957).").

Plaintiffs contend that "about the first week of November 2007," (prior to the November 13 and November 20, 2007 entries of final judgments in the state cases, *see* Defendants' Exh. G, at Nos. 149, 159), plaintiffs obtained new information demonstrating that the state test results failed to note all frequencies and magnitude of frequencies under the state's control, "including 9 microwave frequencies that were operated during the years 1992-2002." *See* Opposition, at ¶ 47-52. Plaintiffs reference the handwritten field notes of State Engineer Michael Esminger (Plaintiffs' Exh. 1), the deposition of State Engineer Richard Williams, and hundreds of pages reflecting FCC licenses for Likely Mountain, with extensive technical specifications (Plaintiffs' Exh. 32).

As defendants point out, plaintiffs, who were previously represented by counsel, failed timely to raise these matters, assuming their relevance, to the state court. As countered by defendants, "it was not until plaintiffs' counsel withdrew and the State of California defendants moved the state court to assess the costs of the litigation against the Plaintiffs that the Plaintiffs first raised the issue of supposed fraud and perjury in court. [Defendants'] Ex. G (entries 150-164)." Reply, at 11. Plaintiffs concede as much. *See* Opposition, ¶ 19, n. 2. Although plaintiffs assert that they "did file a motion to strike costs based on fraud and perjury . . . the Court refused to reconsider, allegedly, stating he would leave it to a higher court to decide the perjury issue." *Id.* Indeed, plaintiffs did file, on November 28, 2007, a Motion for Peremptory Writ of Mandate to vacate the superior court judgments "in light of new found evidence." *See* Defendants' Exh. Y, to Noonan Decl., Dckt. No. 197. The motion was summarily denied with a notation that "[r]emedy by appeal is adequate." Defendants' Exh. N, at p.2. The California Supreme Court summarily denied review.

Defendants' Exh. N and O. However, plaintiffs did not pursue an appeal.

"[T]he alleged fraud – consisting of 'deliberate, intentional misrepresentations, untruths, half truths, and deceitfully misleading affidavits, arguments and declarations" . . . is clearly what courts have consistently characterized as intrinsic fraud, not extrinsic." *Beresh v. Sovereign Life Ins. Co.*, 92 Cal.App.3d 547, 553 (2d Dist. 1979).14 Relief is not available in a subsequent proceeding on the basis of intrinsic fraud. *Id.* "The reason of this rule is, that there must be an end of litigation; and when parties have once submitted a matter, or have had the opportunity of submitting it, for investigation and determination, and when they have exhausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy." *Pico v. Cohn*, 91 Cal. 129, 133 (1891).

Accordingly, plaintiffs' allegations of intrinsic fraud do not undermine the substance of the state court decisions.

Plaintiffs also assert that the Van Stavern letter, discussed *supra*, "fails to state . . . that the FCC's investigations is [sic] not 'closed' and investigations are still ongoing and that they refuse to release any information or reports until it is closed and final." Plaintiffs' Motion to Strike, at pp. 13-14 (citing Plaintiffs' Exhibit 14, at pp. 81-82); *see also* Opposition, at ¶ 19. The Van Stavern letter (Defendants' Exhibit A) sets forth the results of FCC testing at Likely Mountain in July and December 2005, which found no radiofrequency exposure in excess of the Commission's MPE limits for public or occupational use. Plaintiffs' Exhibit 14 is an August 30, 2007 letter to plaintiff Mary Jasso from Julius Knapp, Chief, FCC Office

of Engineering and Technology. Dckt. No. 190-2, at pp. 99-100. The letter acknowledged plaintiff's August 2

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14 "Any fraud is intrinsic if a party has been given notice of the action and has not been prevented from participating therein, that is, if he or she had the opportunity to present his or her case and to protect himself or herself from any mistake or fraud of his or her adversary, but unreasonably neglected to do so. When a claim of fraud goes to an issue involving the merits of the prior proceeding which the moving party should have guarded against at that time, or if the moving party was guilty of negligence in failing to prevent the fraud or mistake or in contributing thereto, or failed to take advantage of liberal discovery policies to fully investigate his or her claim, any fraud is intrinsic fraud." *In re Marriage of Stevenot*, 154 Cal.App.3d 1051, 1069 (1st Dist. 1984).

2007 email request for information about Likely Mountain, including RF radiation levels and mitigation measures, "for the year 2004." Mr. Knapp stated that "[a] search of the Office of Engineering and Technology and the Enforcement Bureau revealed material relevant to your request," but explained that the material would be withheld because it includes inter- or intra agency memoranda, or is protected by the deliberative process privilege. Mr. Knapp referenced "internal FCC emails dated October 1-4, 2004 . . . [which] reflect opinion, advice, and recommendation material that is part of the predecisional process concerning a Commission investigative case," and "[a] draft letter dated July 23, 2004, addressed to you" as "being withheld as part of the predecisional process." *Id.*

Thus, plaintiffs' challenge to the Van Stavern letter is that it omits reference to Mr. Knapp's acknowledgment that FCC's investigation of Likely Mountain remains ongoing. However, this acknowledgment, made in 2007, was limited, at least implicitly, to data no earlier than 2004.[15] Thus, the failure of the March 2006 Van Stavern letter to reference the FCC's ongoing investigation does

not appear to omit information relevant to the period encompassed by plaintiffs' presence on Likely Mountain. Moreover, Ms. Jasso was informed that she could seek review of Mr. Knapp's response by filing an application for review with the Office of General Counsel within thirty days, yet plaintiffs do not indicate that they further attempted to obtain this information, either by seeking review with the FCC Office of General Counsel or pursuant to further correspondence with Mr. Knapp or the FCC Office of Engineering and Technology.

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15 The VanStavern letter, like the Knapp letter, references no information prior to 2004. Mr. VanStavern recounted in pertinent part: "On May 10, 2004, Mary Jasso . . . filed an informal complaint with the FCC's Office of Engineering and Technology ("OET") alleging that she was experiencing ill health effects due to exposure to RFR at the Likely Mountain site. Ms. Jasso filed a subsequent complaint with the FCC's San Francisco District Office on October 6, 2004. Preliminary calculations by OET, based on the licensed transmitters at the site, their height and effective radiated power, among other factors, showed that it was highly unlikely that an RFR violation existed at the site. It was decided that the next time an FCC agent was in the Likely Mountain area, the agency would perform an RFR survey at the site." Defendants' Exhibit A, at p. 2.

It remains fundamental that plaintiffs concede they "have not had tests conducted at Likely Mountain for several reasons," including expense and because such evidence would be challenged as "after the fact." Opposition, at ¶ 19. The declarations submitted by plaintiffs do not diminish the speculative nature of their position.[16]

This court therefore concludes that the controlling issue in the instant case – whether the radiofrequency radiation on Likely Mountain exceeded federal MPE standards during the period 1992 to 2002 – was raised, substantively opposed, actually litigated, submitted for decision, decided, and essential to the judgments of the Lassen County Superior Court.

4. State Court Decisions are Final

The Lassen County Superior Court granted summary judgment to the state defendants on the merits of the issue that controlled both plaintiffs' claims and the defense. The state court examined and addressed the evidence produced by all parties and concluded, on the merits, that while defendants had met their evidentiary burden for summary judgment, plaintiffs had failed to demonstrate the existence of a triable issue of fact. Accordingly, the state court concluded that a trial would be inappropriate, and granted summary judgment, on the merits, to defendants.

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16 For example, Raymond Singer, Ph.D., a neurobehavioral toxicologist and neuropsychologist, concluded, based on plaintiffs' completion of Neurotoxicity Screening Surveys, that nearly all plaintiffs tested positive for neurotoxicity and "[t]he most likely explanation of their dysfunction is neurotoxicity from RF and EMF pollution emanating from the Likely Mountain site." Singer Decl., at pp. 1-6. Richard A. Tell, a physicist, described generally the types of burns and shocks attributable to radiofrequency voltage. Tell Decl., at pp. 1-2. Gerald Moore, a broadcast consultant specializing in radio-frequency radiation measurements and analysis, reviewed the state and FCC test results, technical schematics of Likely Mountain, and transcripts of plaintiffs' depositions, and concluded that "plaintiff s may have been exposed to levels of electromagnetic radiation that were significantly higher than reported in the aforementioned declarations;" "it is possible that the FM and TV antennas were not even on when the readings were taken. There is no way to know [because] the reports . . . were noticeably deficient in not mentioning or identifying all the sources of RF radiation that were transmitting at the time of measurement;" and "the radio frequency levels at the site of the trailer could have been higher at the time the plaintiffs were on Likely Mountain tha[n] at the time the state and FCC took readings." Moore Decl., at pp. 2, 3, and 5. Finally, Gunnar Heuser, M.D., a neurotoxicologist and plaintiffs' treating physician, opined, based on examinations and objective testing (SPECT scans), that each plaintiff has abnormal brain activity consistent with toxic encephalopathy caused by exposure to electromagnetic fields, probably from Likely Mountain. Heuser Decl., at pp. 1-5. However, neither this

proposed evidence of causation, nor that of Dr. Singer, may be addressed absent a demonstrated breach of the relevant standard of care.

In the California courts, "summary judgment on the complaint is a judgment on the merits." *Columbus Line, Inc. v. Gray Line Sight-Seeing Companies Associated, Inc.*, 120 Cal.App.3d 622, 629 (2d Dist. 1981); *see also Jackson v. Hayakawa*, 605 F.2d 1121, 1125, n. 3 (9th Cir.1979). Moreover, the summary judgments in the state court actions, entered November 13 and November 20, 2007, have become final, as no appeal was taken. *See* Rule 8.104, Cal. Rules of Court (notice of appeal must be filed 180 days after entry of judgment). Clearly, the state court decisions here are decisions "on the merits."

5. Plaintiffs are the Same As, or in Privity With, Plaintiffs in the State Actions Eleven of the thirteen plaintiffs in this action – all but Mary Jasso and Illa Garcia – were parties to, and actual participants in, the final state court decisions. For purposes of collateral estoppel, these eleven are bound by the state court judgments.

Mary Jasso and Illa Garcia are also bound by the state court judgments based on their privity with the other plaintiffs. California courts apply the concept of privity where there is "a relationship between the party to be estopped and the unsuccessful party in the prior litigation which is 'sufficiently close' so as to justify application of the doctrine of collateral estoppel." *Clemmer v. Hartford Ins. Co.*, 22 Cal.3d 865, 875 (1978) (citations omitted). "In the context of collateral estoppel, due process requires that the party to be estopped must have had an identity or community of interest with, and adequate representation by, the losing party in the first action as well as that the circumstances must have been such that

the party to be estopped should reasonably have expected to be bound by the prior adjudication."17 *Id.*

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17 "Thus, in deciding whether to apply collateral estoppel, the court must balance the rights of the party to be estopped against the need for applying collateral estoppel in the particular case, in order to promote judicial economy by minimizing repetitive litigation, to prevent inconsistent judgments which undermine the integrity of the judicial system, or to protect against vexatious litigation." *Clemmer*, 22 Cal.3d at 875 (citation omitted).

Mary Jasso and Illa Garcia commenced the state court action with the other plaintiffs. As set forth in the related case (*see* n. 1, *supra*), Jasso and Garcia were dismissed from that action after the court determined that their exclusive remedy lay with the California Workers Compensation System. *See also* Defendants' Exh. G. After the superior court denied their request for reconsideration, Jasso and Garcia filed separate notices of appeal which were consolidated for review. On May 25, 2007, the California Court of Appeal Third Appellate District affirmed the trial court's decision. Jasso and Garcia were unsuccessful in their petition for review to the California Supreme Court (August 8, 2007), petition for writ of certiorari to the U.S. Supreme Court (January 14, 2008), and request for rehearing therein (March 3, 2008).

Thus, Mary Jasso and Illa Garcia had a clear "community of interest" with the plaintiffs who remained in the state action. The dismissal of Jasso and Garcia from the state action was based on their unique status, vis a vis the other plaintiffs, as state employees suing, *inter alia*, their employers. However, the additional plain-tiffs, all family members of Jasso or Garcia, were included in both the state and present actions on the singular ground that their injuries allegedly resulted from radiation exposure when they visited or lived with Jasso or Garcia. *See* FAC, at ¶¶ 27, 28; Opposition, at ¶ 70. Thus, the purposes of

applying collateral estoppel to parties in privity with the unsuccessful parties are expressly met by applying to Jasso and Garcia the substantive decisions and judgments in the state action rendered after their dismissal on other grounds.

For the foregoing reasons, this court concludes that each of the factors for collateral estoppel have been met, precluding relitigation of the controlling issue herein whether radiofrequency radiation on Likely Mountain exceeded federal maximum permissible exposure standards during the period 1992 to 2002.

C. SUMMARY JUDGMENT

Defendants' motion for summary judgment, grounded in collateral estoppel, should be granted. Plaintiffs have failed to demonstrate a genuine and material factual dispute as to the elements for application of collateral estoppel doctrine to these claims. The claims asserted in this action are the same as those litigated to finality in the state court. "Summary judgment is an appropriate remedy when the doctrine of res judicata in its subsidiary form of collateral estoppels refutes all triable issues of fact suggested by the pleadings and supporting documents," *Sartor v. Superior Court*, 136 Cal.App.3d 322, 327 (2d Dist. 2002), and "when all the material issues of fact in a pending action have been actually and necessarily resolved in a prior proceeding," *S.E.C. v. Freeman*, 290 F.Supp. 2d 401, 404 (S.D.N.Y. 2003) (citing *State of New York v Julius Nasso Concrete Corp.*, 202 F.3d 82, 86 (2d Cir.2000)).

CONCLUSION

For the foregoing reasons, it is hereby RECOMMENDED that:

1. Defendants' motion for summary judgment, Dckt. No. 170, be GRANTED;

2. Judgment be entered in their favor; and,

3. The Clerk be directed to close the case.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the pro-visions of 28 U.S.C. § 636(b)(l). Within ten days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections within the specified time may waive the right to appeal the District Court's order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

Dated: March 11, 2009.

s/Edmund F. Brennan
United States Magistrate Judge

EXHIBIT 7

Endorsed Filed
August 24, 2006
R. Reed Chief Administrative Officer
LASSEN COUNTY COURTS
s/ S. Spangler Deputy
SUPERIOR COURT OF CALIFORNIA
COUNTY OF LASSEN
Mary A. Jasso,
plaintiff,
v.
California Department of Forestry, et. al.,,
Defendant.
41697
ORDER AND JUDGMENT ON DEMURRER
TO SECOND AMENDED COMPLAINT BY
MARY JASSO AND HIGINIO JASSO
Date: 8/7/06

Time: 1:30 p.m.
Dept: One
Judge: Stephen D. Bradbury
Trial Date:
Action Filed: July 25, 2005

This matter having come before the court on demurrer to second amended complaint by defendants Department of Forestry and Fire Protection, California Department of General Services, California Department of Highway Patrol; and California Department of Fish and Game for good cause appearing:

IT IS HEREBY ORDERED that

1. The demurrer of defendants Department of Forestry and Fire Protection, California Department of General Services, California Department of Highway Patrol; and California Department of Fish and Game to plaintiff Mary Jasso's second amended complaint is sustained without leave to amend. Plaintiff's sole and exclusive remedy against the State is workers' compensation. (Labor Code, §3600, Columbo v. State of California, (1991) 3 Cal.App.4th 594.) Telecommunications does not rise to the level of conduct contrary to public policy such that an exception to the exclusive remedy of workers' compensation is applicable. (See Portillo v. G.T. Price Products, Inc (1982) 131 Cal.App.3d 285 [wrongful discharge contrary to public policy]; Judson Steel Corp. v. Workers' Compensation Appeals Bd. (19780 22Cal.4th 880 [age discrimination contrary to public policy]; Rojo v. Klinger (1990) 52 Cal.3d 65 [sexual discrimination contrary to public policy].

2. Judgment is entered in favor of defendants Department of Forestry and Fire Protection, California Highway Patrol; Department of Fish & Game, and Department of General Services, and against Mary Jasso.

3. The demurrer of defendants Department of Forestry and Fire Protection, California Highway Patrol,

Department of Fish & Game, and Department of General Services to plaintiff Higinio Jasso's second amended complaint is overruled insofar as the court finds the second amended complaint states facts sufficient to overcome demurrer as to claims premised on Government Code §815.6 and Government Code §835. The court finds the second amended complaint states facts sufficient to overcome demurrer as to mandatory duty under 8 C.C.R., §8618 and 47 C.F.R., §1.1307(b).
Dated: Aug 24 2006
s/ Stephen D. Bradbury
Judge of the Superior Court

EXHIBIT 8

California Civil Jury Instructions (CACI)
§460. Strict Liability for Ultrahazardous Activities - Essential Factual Elements;

[*Name of plaintiff*] claims that [*name of defendant*] was engaged in an ultrahazardous activity that caused [him/her/it] to be harmed and that [*name of defendant*] is responsible for that harm.

People who engage in ultrahazardous activities are responsible for the harm these activities cause others, regardless of how carefully they carry out these activities. [*Insert ultrahazardous activity*] is an ultrahazardous activity.

To establish [his/her/its] claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of defendant*] was engaged in [*insert ultrahazardous activity*];

2. That [*name of plaintiff*] was harmed;

3. That [*name of plaintiff*]'s harm was the kind of harm that would be anticipated as a result of the risk created by [*insert ultrahazardous activity*]; and

4. That [*name of defendant*]'s [*insert ultrahazardous activity*] was a substantial factor in causing [*name of plaintiff*]'s harm.

Sources and Authority

"The doctrine of ultrahazardous activity provides that one who undertakes an ultrahazardous activity is liable to every person who is injured as a proximate result of that activity, regardless of the amount of care he uses." (*Pierce v. Pacific Gas & Electric Co.* (1985) 166 Cal.App.3d 68, 85 [212 Cal.Rptr. 283], internal citations omitted.) Whether an activity is ultrahazardous is a question of law to be determined by the court. (*Luthringer v. Moore* (1948) 31 Cal.2d 489, 496 [190 P.2d 1].)

Restatement of Torts Second, section 519, provides:

(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels f another resulting from the activity, although he has exercised the utmost care to prevent the harm.

(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

Restatement of Torts Second, section 520, provides: In determining whether an activity is abnormally dangerous, the following factors are to be considered:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on; and

(f) extent to which its value to the community is outweighed by its dangerous attributes.

Section 519 formerly provided, in part, that "one who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize is likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm." This section was followed by the court in *Luthringer, supra,* and by other courts in subsequent cases. (See *Garcia v. Estate of Norton* (1986) 183 Cal.App.3d 413, 418 [228 Cal.Rptr. 108].) This statement regarding forseeability is evidently still good law in California, even though the wording of section 519 does not presently contain the limitation.

Strict liability in this context has been confined to "consequences which lie within the extraordinary risk posed by the abnormally dangerous activity and is limited to the 'class of persons who are threatened by the abnormal danger, and the kind of damage they may be expected to incur.'" (*Goodwin v. Reilley* (1985) 176 Cal.App.3d 86, 92 [221 Cal.Rptr. 374], citing Prosser & Keeton, The Law of Torts (5th ed. 1984) § 75, p. 562.)

"The important factor is that certain activities under certain conditions may be so hazardous to the public generally, and of such relative infrequent occurrence, that it may well call for strict liability as the best public policy." (*Luthringer, supra,* 31 Cal.2d at p. 500.)

"It is axiomatic that an essential element of a plaintiff's cause of action, whether based on negligence or strict liability, is the existence of a causal connection between defendant's act and the injury which plaintiff suffered." (*Smith v. Lockheed Propulsion Co.* (1967) 247 Cal.App.2d 774, 780 [56 Cal.Rptr. 128], internal citations omitted.)

Defendant contended that the strict liability doctrine "cannot be applied unless the defendant is aware of the abnormally dangerous condition or activity." This is unsound: One who carried on such an "activity is liable for injuries to a person whom the actor reasonably should recognize as likely to be harmed . . . , even though 'the utmost care is exercised to prevent the harm.'" (*Garcia, supra*, 183 Cal.App.3d at p. 420, internal citation omitted.)

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